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No. (1)

In The
Supreme Court of the United States

DERRICK ("RABBIT") LOWERY, a minor, et al.,
Petitioners,

v.

MARTY EUVERARD, et al.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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June 13, 2008

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QUESTIONS PRESENTED FOR REVIEW

I. Whether *Tinker v. Des Moines Independent School District* and *Morse v. Frederick* permit school officials to punish a student for his viewpoint as long as the speech does not involve a matter of public concern.

II. Whether a high school student's permanent dismissal from a varsity athletic team, or other voluntary, extracurricular activity, in retaliation for the student's exercise of his free speech rights, is a sufficiently adverse action to establish a violation of 42 U.S.C. § 1983.

III. Whether school officials may dispense with *Tinker's* requirement that there be evidence of disruption and punish a student based upon his viewpoint.

IV. Whether the right of a high school student to engage in speech that criticizes an abusive high school coach was clearly established as of October 10, 2005.

LIST OF PARTIES TO THE PROCEEDING

Petitioners are Jeff Lowery, Lisa A. Lowery, Derrick "Rabbit" Lowery, Randy Giles, Jacob Giles, Stacey Guthrie, Joseph Dooley, James Spurlock, Lora Spurlock, and Dillon Spurlock.

Respondents are Marty Euverard, Dale Schneitman, Craig Kisabeth, and the Jefferson County Board of Education.

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW i

LIST OF PARTIES TO THE PROCEEDING ii

TABLE OF CONTENTS iii

TABLE OF CITED AUTHORITIES vi

INTRODUCTION 1

OPINIONS BELOW 1

STATEMENT OF BASIS FOR JURISDICTION .. 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

JUDGMENT TO BE REVIEWED 2

STATEMENT OF THE CASE 3

Procedural History 11

REASONS FOR GRANTING THE WRIT 14

I. By Applying The "Public Concern" Test To This Student Speech Case, The Sixth Circuit's Opinion Conflicts With *Tinker* And The Authoritative Decisions Of Every Other United States Court Of Appeals That Has Addressed This Issue 14

II. This Court Should Grant The Petition To Settle An Important Question Of Federal Law On Which The Circuits Are Divided: Whether Permanent Dismissal From An Extracurricular Activity May Constitute An Adverse Action Under 42 U.S.C. § 1983 In A Student Speech Case 19

III. The Petition Should Be Granted Because The Sixth Circuit Grounded Its Decision Solely Upon Petitioners' Viewpoint, Dispensing With *Tinker's* Requirement That There Be Evidence Of Disruption 24

A. The Sixth Circuit's decision is improperly based upon Petitioner's viewpoint. 24

B. Joining the Eighth Circuit, the Sixth Circuit dispensed with *Tinker's* requirement that there be evidence of substantial and material interference with the operation of the school. 28

C. There is a conflict among the circuits on this issue. 34

IV. The Petition Should Be Granted To Clarify That A Student's Right To Criticize An Abusive School Official Without Disruption Is Clearly Established 35

CONCLUSION 36

APPENDIX

Appendix A: August 3, 2007 6th Cir. Opinion . 1a

Appendix B: August 22, 2006 District Court Order 51a

Appendix C: February 1, 2008 6th Cir. Order denying rehearing 53a

Appendix D: September 18, 2006 Excerpts from 8/18/06 Hearing 55a

Appendix E: Petition for Rehearing En Banc . 70a

Appendix F: Petition 94a

Appendix G: School Board Policy 6.704 .... 95a

Appendix H: School Board Policy 6.303 .... 98a

Appendix I: Amendment I of the United States Constitution and 42 U.S.C. § 1983 ..... 104a

TABLE OF CITED AUTHORITIES

CASES

Bd. of County Comm'rs v. Umbehr,
518 U.S. 668 (1996) 20, 22

Bell v. Johnson, 308 F.3d 594 (6th Cir. 2002) ... 20

Bennett v. Hendrix,
423 F.3d 1247 (11th Cir. 2005) 20

Bethel Sch. Dist. 403 v. Fraser,
478 U.S. 675 (1986) 16, 24

Bloch v. Ribar, 156 F.3d 673 (6th Cir. 1998) 20

Bolger v. Youngs Drug Prods. Corp.,
463 U.S. 60 (1983) 25

Cain v. Tigard-Tualatin Sch. Dist. 23J,
262 F. Supp. 2d 1120 (D. Or. 2003) 18, 23

Connick v. Myers, 461 U.S. 138 (1983) 13, 16

Constantine v. Rectors & Visitors of George Mason Univ.,
411 F.3d 474 (4th Cir. 2005) 23

Crawford-El v. Britton, 523 U.S. 574 (1998) 21

Crocker v. TSSAA,
735 F. Supp. 753 (M.D. Tenn. 1990) 23

Garcia v. S.U.N.Y. Health Servs. Ctr. of Brooklyn,
280 F.3d 98 (2d Cir. 2001) 17, 18

Guiles v. Marineau,
461 F.3d 320 (2d Cir. 2006) 35

Hazelwood Sch. Dist. v. Kuhlmeier,
484 U.S. 260 (1988) 16, 24

Henley v. Tullahoma City Sch. Sys.,
84 Fed. Appx. 539 (6th Cir. 2003) 21

Hope v. Pelzer, 536 U.S. 730 (2002) 36

Laird v. Tatum, 408 U.S. 1 (1972) 20

Morse v. Frederick,
127 S. Ct. 2618 (2007) ..... *passim*

Pagan v. Fruchey,
492 F.3d 766 (6th Cir. 2007) 33

Pinard v. Clatskanie Sch. Dist. 6J,
467 F.3d 755 (9th Cir. 2006) ..... *passim*

Police Dep't. of Chicago v. Mosley,
408 U.S. 92 (1972) 25

QVYJT v. Lin,
953 F. Supp. 244 (N.D. Ill. 1997) 17

Rosenberger v. Rector & Visitors of Univ. of Va.,
515 U.S. 819 (1995) 25

Rutan v. Republican Party of Illinois,
497 U.S. 62 (1990) ..... *passim*

Saucier v. Katz, 533 U.S. 194 (2001) 36

Saxe v. State Coll. Area Sch. Dist.,
240 F.3d 200 (3d Cir. 2001) 29, 35

Scott v. Harris, 127 S. Ct. 1769 (2007) 32

Seamons v. Snow,
84 F.3d 1226 (10th Cir. 1996) 23, 34

Seamons v. Snow,
15 F. Supp. 2d 1150 (D. Utah 1998),
rev'd 206 F.3d 1021. 18

Seamons v. Snow,
206 F.3d 1021 (10th Cir. 2000) 17, 18

Shelton v. Tucker, 364 U.S. 479 (1960) 15

Siggers-Dell v. Barlow,
412 F.3d 693 (6th Cir. 2005) 21

Street v. New York, 394 U.S. 576 (1969) 25

Terminiello v. Chicago, 337 U.S. 1 (1949) 29

Texas v. Johnson, 491 U.S. 397 (1989) 24, 29

Tinker v. Des Moines Independent School District,
393 U.S. 503 (1969) ..... *passim*

TSSAA v. Brentwood Acad.,
127 S. Ct. 2489 (2007) 33

West Virginia Bd. of Educ. v. Barnette,
319 U.S. 624 (1943) 25, 28

Wildman v. Marshalltown,
249 F.3d 768 (8th Cir. 2001) 22, 31, 34

STATUTES

28 U.S.C. § 1254(1) 2

28 U.S.C. § 2101 2

42 U.S.C. § 1983 2

OTHER

Speaking Up About Sexually Abusive Coaches, ABC News, Oct. 15, 2004, http://abcnews.go.com/2020 News/Story?id+165510&page=1 36

Coaches Who Prey, The Seattle Times, Dec. 14-17, 2003, http://seattletimes.nwsource.com/news/lo ca/coa ches/ 36

Wishnietsky, "Reported and Unreported Teacher-Student Harassment," Journal of Research, Vol. 3 (1991) 37

INTRODUCTION

In the fall of 2005, four students from a public high school in rural east Tennessee signed a petition that was critical of the varsity football coach. Typed by one of the students on his home computer, the petition was based upon the coach's repeated acts of abusive and humiliating conduct toward the player's teammates. Within four days of the coach's learning of the petition, he permanently dismissed this player and three other supposed "ringleaders" from the team. Despite the express holding of *Tinker v. Des Moines Independent School District*, 393 U.S. 503, 509 (1969) that a student's right to freedom of speech extends to "the playing field," the Sixth Circuit upheld the dismissal. In a decision that will have broad ramifications for any student who risks reprisal by speaking out against an abusive coach, teacher, or other school official, a divided panel of the Sixth Circuit held that the speech was unprotected because of the viewpoint expressed and because the punishment was merely dismissal from an extracurricular activity. In so doing, the Sixth Circuit emasculates *Tinker* and ignores the unconstitutional conditions doctrine, restricting the free speech rights of students to those few situations where a student is suspended or expelled for opining on a matter of public concern.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit upon which this Petition for Writ of Certiorari is filed is reprinted at App. 1a-50a and is published at 497 F.3d 584 (6th Cir. 2007). The order of the United States Court of Appeals for the Sixth

Circuit denying rehearing *en banc* is reprinted at App. 53a-54a and is not otherwise published. The order of the United States District Court for the Eastern District of Tennessee granting partial summary judgment in favor of Plaintiffs/Petitioners is reprinted at App. 51a-52a and is not otherwise published.

STATEMENT OF BASIS FOR JURISDICTION

The court of appeals entered its judgment on August 3, 2007. Petitioners timely filed a petition for rehearing *en banc* on August 17, 2007. (Appendix E). On February 1, 2008, the court of appeals issued its order denying Petitioners' petition for rehearing *en banc*. On April 16, 2008, Petitioners timely filed a request for extension of time in which to file a petition for certiorari. This request was granted on April 18, 2008. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1) and 28 U.S.C. § 2101.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The statutory and constitutional provisions involved in this action are 42 U.S.C. § 1983 and the First Amendment to the United States Constitution. (Appendix I).

JUDGMENT TO BE REVIEWED

Petitioners seek review by the Supreme Court of the judgment of the Sixth Circuit Court of Appeals, which reversed the judgment of the District Court and remanded for entry of summary judgment in favor of Respondents.

STATEMENT OF THE CASE

Petitioners are former high school students at Jefferson County High School ("JCHS"), and their parents.[1] Because it is the only public high school in this rural, east Tennessee county, JCHS is the only place to play high school football in the county. All four student-athletes were members of the varsity football team during the 2005 season. Prior to the incident in question, none of the boys had ever been disciplined by a coach, or suspended or expelled from school.

Six games into the season, Jacob Giles, a sophomore who started for the team, prepared a document on his home computer, which he called a "petition." The petition was the product of discussions between Giles, Joseph Dooley, Derrick Lowery, and other players about their dislike of the head coach, Marty Euverard, based upon his treatment of their present and former teammates. The following are some examples of Euverard's conduct, which led to the creation of the petition:

- Euverard used unnecessary force with players. For example, during a football practice in 2004, players witnessed Euverard delivering a hard, open-handed punch to the side of Kevin Cline's helmet, which violently jarred Cline's head. A teammate, Daniel Green, testified that "[i]n all

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[1] Although the parents of the four student-athletes are also parties to the petition, for the sake of brevity, the four student-athletes will be referred to as "Petitioners."

my experiences playing football, I never had seen a coach hit a player this hard."[2]

- Euverard threw away and directed others to throw away college recruiting letters to disfavored players. Athletic department secretary Annie Watkins testified that Euverard had told her to dispose of recruiting letters to Chad Williams.

- Euverard humiliated and degraded players in front of the entire football team. For example, Euverard told the football team that Michael Snapp made him "want to vomit" and was a disgrace to the football team, to Jefferson County, and to his family.

- Euverard implemented a mandatory year-round conditioning program, in violation of applicable high school rules, and punished players who missed these workouts.

The petition stated simply: "I hate Coach Euvard and I don't want to play for him." (Appendix F).

Giles intended to circulate the petition among players and former players, some of whom had quit the team because of Euverard's conduct. After these students had been given an opportunity to sign the petition, Giles intended to present it to the principal, Dale Schneitman, at the end of the season in the hope that Euverard would be replaced as the coach. In

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[2] These facts are documented in affidavits and deposition testimony contained in the record.

circulating the petition, Giles wanted players who felt as strongly as he did to have an opportunity to express their opinion to the school administration.

Starting on Monday, October 3, Giles approached Dooley about signing the petition, and Dooley did so. Giles and Dooley then approached a number of other players. Lowery, Spurlock, and many other players signed the petition. Among the players who signed the petition were the starting and backup quarterbacks. In three days, eighteen of the thirty-seven players on the football team signed it. Assistant coach Brimer, who has coached football at JCHS since 1976, testified that he has never had a situation where such a large percentage of players expressed their dissatisfaction with a coach.

Giles and Dooley circulated the petition before and after school, during breaks, and outside of football practice. This was done to prevent any disruption in school or on the field. Giles limited his distribution of the petition to current players and former members of the team who had quit. Four players who were approached about signing the petition declined. When those players told Giles that they did not want to sign the petition, Giles responded: "That's perfectly fine, I understand."

The circulation and signing of the petition did not cause any disruption to class or to football practices or games. There were no arguments between players concerning the petition. In fact, assistant coach Brimer testified that he did not have any evidence that the petition interfered with academic or football operations.

Although Giles' original intent was to offer every player the opportunity to sign the petition, he stopped circulating it on October 5 when he became concerned that the coaches might find out about it.

On Friday night, October 7, the JCHS football team played an away game. After JCHS lost the game, the football coaches met, and Euverard heard of the petition for the first time from assistant coach Upton. Upton had not seen the petition, but a player had told him about it. Upton said that the purpose of the petition was to get Euverard fired as head coach. According to Brimer, Euverard became upset and responded: "Well, I needed to know about it immediately." Brimer testified that, as an assistant coach, he would have wanted to know about the petition "early, as soon as possible" so that he could "take steps to eliminate the problem."

Subsequently, a special meeting was convened with the school administration the following Sunday to discuss the petition. The meeting lasted approximately eight hours and was limited to the petition and how to deal with it. During the meeting, Euverard was told by assistant coach Smoot that Giles, Dooley, and possibly Lowery, had started the petition. Despite the fact that the team had a losing record even before the petition was started, Euverard said that the petition was "tearing apart our team." Schneitman, a former coach, warned the coaches that petitions "destroy" football teams.

Euverard then laid out a plan. Instead of conducting practice the next day, he decided to interrogate each boy individually about the petition.

At the time, the Jefferson County School Board (the "Board") had adopted a policy concerning free speech which expressly permitted a student to "responsibly express himself/herself and to disseminate his/her views in writing." The policy cited *Tinker*. (Appendix G). However, there was no discussion about the players' rights under the policy. Though present, neither Schneitman nor the athletic director criticized, questioned, or countermanded Euverard's plan.

Euverard's plan was carried out, as scripted, the next day. Euverard interrogated each student, one by one, in a small office in the weight room, with no other persons present except Brimer. Euverard sat face-to-face, approximately three feet away from each student. During each interrogation, Euverard generally used the same questions, which he had devised, all relating to the petition: (1) Have you heard about the petition? (2) Did you sign it? and (3) Who asked you to sign it? If a student did not volunteer information responsive to the third question, he was asked directly whether Giles and Dooley had asked him to sign the petition. During the initial interrogation of players – before he came to Giles, Dooley, and Lowery – several players told Euverard that Giles and Dooley had advocated his dismissal as coach.

Both the players being interrogated and Euverard referred to the document at issue as a "petition." Euverard told players that the petition was hurting the football team, telling at least one player: "petitions and separations are an important reason for us being two and five." Euverard's demeanor was such that players felt that they would be dismissed from the team if they admitted to signing the petition. On the

first day of interrogations, only three players "admitted" to signing it. Those students were sent to the weight room to wait for Euverard. Later, Euverard told these three students to have their parents come to football practice the next day. All other players were sent back to the locker room to be with their teammates.

Euverard dismissed Giles, Dooley, and Lowery from the JCHS football team that same day, while the interrogations were being conducted. By that point, multiple players had informed Euverard that Giles and Dooley were the ringleaders in the circulation of the petition. Euverard had also been told on Sunday that Lowery might have been a leader in the circulation of the petition. The dismissal was permanent. As acknowledged by an assistant coach, this is the harshest punishment a football coach can levy upon a high school football player.

There is a factual dispute as to the basis for the dismissal of these three students, as the District Court found. Petitioners contend that it was because they were the "ringleaders" in the petition drive.

On October 11, Euverard continued his interrogation of players. Previously, a player had informed Euverard that Spurlock, another sophomore, had said he would be the "first to sign" the petition. When Brimer heard this information, he marked six asterisks by Spurlock's name in his notes and wrote, "Important – another name involved."

When Spurlock was called into the room for his interrogation, Euverard asked if he had been

approached concerning the petition. Spurlock answered, "yes." Next, Euverard asked Spurlock, "Did you sign the petition?" Spurlock told Euverard that he did. Then, Euverard asked Spurlock: "Do you still feel that way?" Spurlock answered: "I love football." According to Spurlock's testimony, Euverard interrupted him and said: "That's not what I'm asking. What I'm asking is do you want to play football for me as head coach?" Spurlock said, "no," but he also said, "I love football and I want to play for Jefferson County High School." Euverard again interrupted Spurlock and sent him to the weight room. Later, Euverard came to the weight room and told Spurlock and another player: "Get your stuff and go to the principal's office. You're not on the team anymore." At the hearing, Euverard admitted that Spurlock was never insubordinate.

Spurlock still wanted to play football, and he never told Euverard that he wanted to quit the team. Although he personally disliked Euverard, Spurlock had continued to play football for JCHS, giving "110 percent" effort, because he "love[d]" football. As Spurlock has testified, the petition states that he did not *want* to play for Euverard, not that he *would not* play for Euverard. Approximately one week later, Schneitman called Spurlock into his office and said he was "stupid" for signing the petition, he "shouldn't have signed it," the petition was the "wrong way" to express his opinions, and Schneitman and the football coaches "just don't like the whole mess."

At the earlier Sunday meeting, Respondents had agreed that dismissing players was "an acceptable price to pay" to fix what they believed was a team

lacking in unity. They discussed dismissing every single player who had signed the petition. However, neither Respondents nor the assistant coaches knew how many players had signed the petition because none of them had seen it.

During the Sunday meeting, Giles' father, Petitioner Randy Giles ("Mr. Giles"), spoke to Schneitman by phone and requested that Schneitman intervene to avoid a confrontational meeting between Euverard and the players. Schneitman flatly refused, saying, "Marty's got to get control of his team and there's got to be consequences for whoever is involved in this." That same night, Director of Schools Doug Moody told Lowery's mother, sarcastically, "You probably do not want to know my ideas on student petitions, do you?"

On the afternoon of October 10, after his son had been kicked off the team, Mr. Giles met with Schneitman, Moody, and the athletic director. Based upon his review of the names on the petition, Mr. Giles suggested that some of the boys had lied to Euverard about not signing it. When Schneitman mentioned dismissing those players from the team, Mr. Giles asked, "Well, if you do that, how are you going to play Friday?" Mr. Giles then showed Schneitman the petition, which contained eighteen names, not three. Mr. Giles also pointed out to Schneitman that both of the team's quarterbacks had signed the petition but lied to Euverard.

Through some means, by the next day Euverard had discovered that a significant number of boys had signed the petition but lied to him. After Euverard

interrogated the players who had been absent, Euverard re-interrogated a number of players he had previously questioned, including the two quarterbacks. The Board had adopted a policy which expressly stated that any student who answered falsely in an interrogation was subject to disciplinary action, including suspension. (Appendix H). Nevertheless, neither the two quarterbacks nor any other players who lied were disciplined in any way. Instead, Euverard "forgave" these players for signing the petition, after they apologized.

Procedural History

This action was filed in the United States District Court for the Eastern District of Tennessee on December 9, 2005. On June 23, 2006, Petitioners filed a motion for partial summary judgment limited solely to the question of whether the student speech was protected under the First Amendment. Thereafter, Respondents filed a motion to dismiss or for summary judgment based, in part, on qualified immunity. Petitioners also filed a motion for a preliminary injunction. After conducting a two-day hearing, which included testimony from Petitioners, Respondents, and other witnesses, the District Court found that there was a factual dispute regarding the basis for the student-athletes' dismissal, requiring a trial on the merits. Nevertheless, the District Court granted Petitioners' Motion for Partial Summary Judgment, finding that the petition and the statements made in connection with the petition were protected speech under *Tinker v. Des Moines Independent School*

District, 393 U.S. 503 (1969).[3] The District Court denied Respondents' Motion for Summary Judgment on qualified immunity, finding that the free speech rights of the players were clearly established. Respondents appealed based upon the denial of qualified immunity.

In a split decision, the Sixth Circuit reversed. In contrast to Judge Gilman, who wrote a separate opinion concurring in the result based solely upon qualified immunity, the panel found as a threshold matter that the speech of Petitioners was not protected by the First Amendment.

The panel began its analysis with a clip from the movie *Hoosiers*, where a high school basketball player is dismissed for telling his coach – in the middle of practice – "I'm getting tired of standing." Using the movie excerpt as the centerpiece of its opinion, the panel concluded that, despite there being no evidence that the petition caused a disruption, the student speech is unprotected.

Relying upon a snippet from a case involving the First Amendment rights of a government employee – a college coach – the Sixth Circuit first drew a distinction between the roles of the high school teacher and high school coach. Based upon the premise that in athletics "[e]xecution of the coach's will is paramount," the panel did not focus upon the free speech rights of students but upon the similarity between adult government employees and athletes. (App. 29a). The

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[3] The parties and the panel agree that the case is governed by *Tinker*.

panel found that such "greater restrictions on student athletes are analogous to the greater restrictions on government employees; thus, legal principles from the government employment context are relevant to the instant case." (App. 31a). There follows a detailed discussion of *Connick v. Myers*, 461 U.S. 138 (1983). Linking *Connick's* constitutional principles to the instant case, the panel concluded that, "[h]igh school football coaches, as well as government employers, have a need to maintain order and discipline," and permitting "attacks on their authority would effectively strip them of their ability to lead." (App. 34a). In the Sixth Circuit's view, "the key to understanding *Connick* and the instant case is that neither case is fundamentally about the right to express one's opinion, but rather the ability of the government to set restrictions on voluntary programs it administers." (App. 35a).

The Sixth Circuit acknowledged "the petition did not in fact disrupt the team." (App. 18a). Further, instead of demanding proof of anticipated disruption, the panel said that "abstract concepts like team morale and unity are not susceptible to quantifiable measurement, yet they undeniably have a large impact on team morale." (App. 22a). To support this proposition, the Sixth Circuit did not cite empirical studies; instead, the court cited ten sports writers and professional athletes. Concluding that the petition would necessarily undermine team unity, the panel concluded that a forecast of substantial disruption of the team was reasonable under *Tinker*.

As to the punishment meted out, the Sixth Circuit concluded that the coach could permanently dismiss

the four students from the team. The panel acknowledged that the coach could not suspend or expel the players, stressing that "Plaintiffs' ability to attend class has not been threatened." (App. 36a). Yet, without any discussion of *Rutan v. Republican Party of Illinois*, 497 U.S. 62 (1990), the unconstitutional conditions doctrine, or the plethora of cases discussing the level of punishment necessary to "chill a person of ordinary firmness," the Sixth Circuit determined that permanent dismissal from this voluntary, extracurricular activity would not violate the First Amendment.

In what is better described as a dissent, Judge Gilman concurred based upon qualified immunity. Grounding his opinion upon express language in *Tinker* that a student's right to express his opinions applies "on the playing field," Judge Gilman opined that the student speech was entitled to constitutional protection.

REASONS FOR GRANTING THE WRIT

I. By Applying The "Public Concern" Test To This Student Speech Case, The Sixth Circuit's Opinion Conflicts With *Tinker* And The Authoritative Decisions Of Every Other United States Court Of Appeals That Has Addressed This Issue

The District Court and the Sixth Circuit agree that the free speech rights of Petitioners are governed by the standard established in *Tinker* and reaffirmed in *Morse v. Frederick*, 127 S. Ct. 2618 (2007). In *Tinker*, this Court reiterated that the "'vigilant protection of

constitutional freedoms is nowhere more vital than in the community of American schools.'" 393 U.S. at 512 (quoting *Shelton v. Tucker*, 364 U.S. 479, 487 (1960)). Holding that minors do not lose their constitutional right to freedom of speech by virtue of attending public school, the *Tinker* court expressly held that such freedom is not restricted to the "supervised and ordained discussion that takes place in the classroom." *Id.* at 512. The court said:

> A student's rights, therefore, do not embrace merely the classroom hours. When he is in the cafeteria, **or on the playing field**, or on the campus during authorized hours, he may express his opinions, even on controversial subjects like the conflict in Vietnam, if he does so without "materially and substantially interfer[ing] with the requirements of appropriate discipline in the operation of the school" and without colliding with the rights of others.

Id. at 512-13 (citations omitted) (emphasis added). Although the black armbands were worn by John Tinker and his little sister to protest the Vietnam conflict, this Court did not purport to limit the protections of the First Amendment to political, religious, or other matters which adults would consider grave or weighty. *Tinker*, 393 U.S. at 511 ("students are entitled to freedom of expression of their views").

Notwithstanding these principles, the Sixth Circuit has added to the *Tinker* analysis the "public concern" test applicable to government employees, dramatically

restricting the First Amendment protections afforded public school students. (App. 39a) (Gilman, J., concurring) ("[W]hat I find most troubling about the lead opinion's analysis is that it significantly alters First Amendment jurisprudence by grafting the public-concern requirement of *Connick v. Myers*, 461 U.S. 138 (1983), onto the *Tinker* test, an approach never before taken in student-speech cases by either the Supreme Court or any other federal court of appeals to consider the issue.").[4]

The requirement that the speech focus on matters of public concern is conspicuously absent from the three leading decisions of this Court addressing student speech since *Tinker*. *See Morse*, 127 S. Ct. 2618 (2007); *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988); *Bethel Sch. Dist. 403 v. Fraser*, 478 U.S. 675 (1986). As Judge Gilman observed,

> . . . the fact remains that government employees and high school athletes are not similarly situated, despite the lead opinion's analysis to the contrary. Whether we think that 'student athletes have greater similarities to government employees than the general student body,' Lead Op. at 12, is not determinative. What *is* determinative is that they are not similarly situated under existing case law. Furthermore,

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[4] The most compelling evidence that the panel has added a "public concern" test is its own acknowledgment that the coach could not dismiss a player for expressing unpopular "religious or political views" or for blowing the whistle on "improprieties." (App. 37a). Implicit in this statement is the acknowledgment that speech in these areas would be protected.

> the Supreme Court has specifically given us one test for students and another test for public employees.

(App. 40a-41a) (Gilman, J., concurring) (emphasis in original). Further, the panel's action is particularly inappropriate in that *Morse* had just been decided by this Court.

> Given the facts of *Morse*, the Supreme Court could well have chosen to add a public-concern requirement to the traditional *Tinker* analysis, but it did not do so. The school superintendent's administrative decision in *Morse* highlighted the fact that the student's speech was not political or espousing a religious viewpoint, but instead was "a fairly silly message promoting illegal drug usage in the midst of a school activity." (citations omitted). But the Court did not depend on this fact in its analysis. Nor did it undercut the force of *Tinker* in a way that has application to the facts of the present case. Justice Alito's concurrence suggests just the opposite.

(App. 42a) (Gilman, J., concurring).

The Sixth Circuit's opinion also puts this circuit at odds with all other courts which have considered the applicability of the 'public concern' test in the context of student speech. *See Pinard v. Clatskanie Sch. Dist. 6J*, 467 F.3d 755, 766 (9th Cir. 2006); *Garcia v. S.U.N.Y. Health Servs. Ctr. of Brooklyn*, 280 F.3d 98 (2d Cir. 2001); *Seamons v. Snow*, 206 F.3d 1021, 1030, n.4 (10th Cir. 2000); *QVYJT v. Lin*, 953 F. Supp. 244,

248 (N.D. Ill. 1997). In a remarkably similar case, the district court in *Seamons* found that a coach's conduct was "reasonable under the circumstances" when viewed under *Connick's* "public concern" test. *Seamons v. Snow*, 15 F. Supp. 2d 1150, 1158 (D. Utah 1998), *rev'd* 206 F.3d 1021. Like the Sixth Circuit here, the trial court held that, just as a district attorney is allowed to fire an employee for disrupting harmony within the office, a high school coach can punish a player for expressing a view not shared by his teammates. *Id.* In reversing, the Tenth Circuit criticized the district court's "attempt[] to analogize the circumstances here to First Amendment cases involving public employees" in the face of "the well-established Supreme Court authority" on the standards applicable to student speech. *Seamons*, 206 F.3d at 1021, n.4. *See also Pinard*, 467 F.3d at 766 ("[N]either *Tinker* nor its progeny limited students' rights solely to the exercise of political speech or speech that touches on a matter of public concern."), *Garcia*, 280 F.3d at 106 ("public concern doctrine does not apply to student speech in the university setting").[5]

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[5] Even if the public concern test did exist in student speech cases, Petitioners' speech did touch on matters of public concern. The undisputed basis for the boys' starting the petition was their concern about repeated acts of physical violence, humiliation of players, and even intentional destruction of college recruiting letters. Where these incidents occurred during a school activity, supervised by school personnel, and funded with public dollars, these matters are unquestionably matters of public concern. *Cain v. Tigard-Tualatin Sch. Dist. 23J*, 262 F. Supp. 2d 1120, 1127 (D. Or. 2003) (allegations of abuse by coach toward players and covering up use of alcohol held to be matter of public concern).

Because the Sixth Circuit's decision runs counter to governing Supreme Court precedent and because there is now a split among the circuits, the petition should be granted.

II. This Court Should Grant The Petition To Settle An Important Question Of Federal Law On Which The Circuits Are Divided: Whether Permanent Dismissal From An Extracurricular Activity May Constitute An Adverse Action Under 42 U.S.C. § 1983 In A Student Speech Case

While the Sixth Circuit's decision erodes the First Amendment rights of all student-athletes to criticize an abusive coach, the most far-reaching effect is to alter fundamentally what constitutes an adverse action in *any* student speech case where the retaliation is anything short of suspension or expulsion from school. Joining the Eighth Circuit, and standing squarely against the Tenth, Ninth, and Second Circuits, as well as its own precedent, the Sixth Circuit held that the punishment was beyond challenge because "Plaintiff's ability to attend class has not been threatened." (App. 36a). This decision ignores one of the most basic principles of civil rights jurisprudence – that deprivations which are otherwise permissible cannot be imposed as punishment for the exercise of a constitutional right. Because this Court has never addressed the quantum of injury applicable in a student speech case and because there now is a clear split among the circuits, the petition should be granted.

Since at least 1972, it has been well-established that "constitutional violations may arise from the deterrent, or 'chilling,' effect of governmental [efforts] that fall short of a direct prohibition against the exercise of First Amendment rights." *Laird v. Tatum*, 408 U.S. 1, 11 (1972) (quoted in *Bd. of County Comm'rs v. Umbehr*, 518 U.S. 668, 674 (1996)). The "modern 'unconstitutional conditions' doctrine holds that the government 'may not deny a benefit to a person on the basis that infringes his constitutionally protected . . . freedom of speech,' even if he has no entitlement to that benefit. *Umbehr*, 518 U.S. at 674 (quoting *Perry v. Sindermann*, 408 U.S. 593, 597 (1972)). This principal has been routinely relied upon by the circuit courts over the last three decades. *See, e.g., Bloch v. Ribar*, 156 F.3d 673, 681-82 (6th Cir. 1998) ("act taken in retaliation for the exercise of a constitutionally protected right is actionable under § 1983 even if the act, when taken for a different reason, would have been proper"). In addition, the uniform standard for evaluating the adverse action is whether the punishment "would deter a person of ordinary firmness from continuing to engage in that conduct." *Bennett v. Hendrix*, 423 F.3d 1247, 1250-51 (11th Cir. 2005). In this regard, the plaintiff's evidentiary burden is merely to establish "that the retaliatory acts amounted to more than a *de minimus* injury." *Bell v. Johnson*, 308 F.3d 594, 606 (6th Cir. 2002). *See also Thaddeus-X v. Blatter* (reversing Zatkoff, J.), 175 F.3d at 398 ("threshold is intended to weed out only inconsequential actions"). Since *Rutan*, it has been clear that retaliation as comparatively insignificant as not giving a birthday cake may be an adverse action under the First Amendment. *Rutan*, 497 U.S. at 75 n.8.

Struggling to force this student speech case into the mold of a government employee case, the Sixth Circuit ignores these fundamental principals. Acknowledging that the First Amendment protects the rights of students to criticize public officials, the Sixth Circuit says: "Likewise, plaintiffs had, and have, a right to express their opinions about Euverard." (App. 35a). Notwithstanding this correct conclusion about the students' rights under *Tinker*, the panel holds that dismissal from the team is acceptable because (a) high school football is a voluntary activity and (b) students have no general constitutional right to participate in a voluntary activity such as football. The panel states:

> Of course, the school could not, and did not suspend them for their opinions. Plaintiff's ability to attend class has not been threatened.

(App. 36a). Significantly, the Sixth Circuit concludes that a student may be permanently kicked off his high school athletic team without any discussion of the "unconstitutional conditions" doctrine, the *Rutan* standard, or its own cases which sift truly "inconsequential" punishments from those which are actionable under § 1983. *See, e.g., Crawford-El v. Britton*, 523 U.S. 574 (1998) (misdirection of personal belongings); *Siggers-Dell v. Barlow*, 412 F.3d 693, 701 (6th Cir. 2005) (transfer of plaintiff from one prison to another).[6] Instead, the panel relies upon a similar

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[6] The panel even ignores precedent from its own circuit. *Henley v. Tullahoma City Sch. Sys.*, 84 Fed. Appx. 539, 540 (6th Cir. 2003) (finding that denial of opportunity to play high school basketball would be sufficiently adverse to "have the tendency to chill such speech").

analysis by the Eighth Circuit in *Wildman v. Marshalltown*, 249 F.3d 768, 772 (8th Cir. 2001).

In *Wildman*, the girl's basketball coach permanently dismissed a player from the team when the student would not apologize for writing an "insubordinate" letter to her teammates. While acknowledging this was humiliating to the student, the Eighth Circuit affirmed the punishment, saying:

> The school did not interfere with Wildman's regular education. A difference exists between being in the classroom, which was not affected here, and playing on an athletic team when the requirement is that the player only apologize to her teammates and her coach for circulating an insubordinate letter.

249 F.3d at 772. Like the Sixth Circuit, the *Wildman* court did not even mention the unconstitutional conditions doctrine described in *Umbehr* or the minimal level of punishment necessary to establish a claim under *Rutan*. Neither of these circuits even asked the question whether permanent dismissal from an athletic team would chill an ordinary student from exercising his First Amendment rights.

As even Respondents acknowledge, the ultimate adverse action for an athlete is permanent dismissal from the high school team. That is particularly true where, as here, there is only one high school in the county and, therefore, only one opportunity to play high school football. As a Tennessee district court has stated, "Money damages simply cannot make up for the lost chance to play with one's classmates and the

thrill and excitement of competitive sports." *Crocker v. TSSAA*, 735 F. Supp. 753, 759 (M.D. Tenn. 1990). Indeed, for many high school students, permanent dismissal from the sports team, or the chorus, or the band, or the club would be more devastating than a temporary suspension from class. The threat of this lost opportunity would have a far greater chilling effect on their speech.

Therefore, in the view of the Sixth Circuit and the Eighth Circuit, had Jacob Giles – like Joseph Frederick – been suspended from school for expressing his opinions, he would have had a claim. However, because Giles was merely kicked off the football team, his constitutional rights are irrelevant.

In contrast, other courts have applied these broad principles to cases involving student speech. *Seamons v. Snow*, 84 F.3d 1226, 1237 (10th Cir. 1996); *Pinard*, 467 F.3d at 766; *Constantine v. Rectors & Visitors of George Mason Univ.*, 411 F.3d 474, 500-01 (4th Cir. 2005); *Cain*, 262 F. Supp. 2d at 1129-30. Most notable is *Pinard*, in which the Ninth Circuit expressly held that permanent suspension from the basketball team would lead ordinary student athletes to refrain from complaining about an abusive coach. 467 F.3d at 766.

To settle this disagreement among the circuits, this Court should grant the petition. Even more importantly, the petition should be granted because this Court has never considered in a student speech case whether a school official's removal of a student's opportunities for extracurricular activities is actionable. Heretofore, the punishment in these cases has always involved some restriction on the student's

"regular education." *Morse*, 127 S. Ct. 2618; *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988); *Bethel Sch. Dist. 403 v. Fraser*, 478 U.S. 675 (1986); *Tinker*, 393 U.S. 503. Because extracurricular activities are so important to students and because the threat of permanently losing such opportunities is so significant, the issue warrants review.

III. The Petition Should Be Granted Because The Sixth Circuit Grounded Its Decision Solely Upon Petitioners' Viewpoint, Dispensing With *Tinker's* Requirement That There Be Evidence Of Disruption

By permitting the punishment of Petitioners based upon their viewpoint without any evidence of disruption, the decision conflicts with the bedrock free speech principle, as made applicable to students in *Tinker* and *Morse*, that the government "may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Texas v. Johnson*, 491 U.S. 397, 414 (1989). Further, the Sixth Circuit has exacerbated the consequences of such viewpoint discrimination by dispensing with *Tinker's* requirement that school officials bring forth actual evidence of "substantial disruption." Based upon this two-fold deviation from the clear mandates of *Tinker* and *Morse*, the petition should be granted.

A. The Sixth Circuit's decision is improperly based upon Petitioners' viewpoint.

It is evident that the decision conflicts with multiple decisions of this Court which prohibit discrimination against a speaker based upon his

viewpoint. "[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Dep't. of Chicago v. Mosley*, 408 U.S. 92, 95 (1972). As this Court stressed in *Street v. New York*, where contemptuous words were applied to the flag, such speech is protected by the "constitutionally guaranteed 'freedom to be intellectually . . . diverse or even contrary,' and the 'right to differ as to things that touch the heart of the existing order.'" 394 U.S. 576, 593 (1969) (quoting *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943)). This Court has repeatedly reaffirmed this fundamental principal. *See, e.g., Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 828 (1995) ("It is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys.") As a result, except in cases involving commercial speech, this Court has sustained such restrictions "only in the most extraordinary circumstances." *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 65 (1983).

In *Tinker*, the Court expressly applied this standard to the speech of high school students. In fact, one of the two "cardinal First Amendment principles animat[ing] both the Court's opinion in *Tinker* and Justice Harlan's dissent" is that ". . . censorship based on the content of speech, particularly censorship that depends on the viewpoint of the speaker, is subject to the most rigorous burden of justification:

> Discrimination against speech because of its message is presumed to be unconstitutional . . . . When the government targets not subject

> matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant. Viewpoint discrimination is thus an egregious form of content discrimination. The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction. (citation omitted).

Morse v. Frederick, 127 S. Ct. at 2644 (Stevens, J., dissenting).

Here, it cannot reasonably be disputed that the school administration targeted the speech of Petitioners because of their viewpoint. The record establishes that, upon learning that a petition was being circulated to have him fired as head football coach, Euverard "became upset, and decided to "smoke out" the culprits and dismiss them from the team." (App. 44a) (Gilman, J., concurring). He implemented this plan by interrogating each player individually and asking him three questions, all related to the petition. Euverard told players that the petition was hurting the football team and told at least one player that "petitions and separations are an important reason for us being two and five." The principal, himself a former coach, told Spurlock that he was "stupid" for signing the petition and that he "shouldn't have signed it." The principal even told Mr. Giles, the night before the boys were dismissed, that there had to be "consequences" for the petition.

Indisputably, the *viewpoint* was being targeted. One need only ask, had the petition been in support of

the coach – to give him a raise, for example, would Euverard have set up an elaborate process to ferret out the instigators. It is also demonstrated by the treatment of Spurlock, who was dismissed after signing it but never engaged in any conduct that could be categorized as insubordinate.

The panel acknowledges that Petitioners had raised the issue of viewpoint discrimination and candidly admits that it is considering the "content" as well as the context of the speech in validating the punishment. (App. 10a). Yet, without citing a single case discussing viewpoint censorship or the "most extraordinary circumstances" which would justify such censorship, the panel brushes the argument aside, saying:

> Plaintiffs suggest that the issue is whether it is permissible for school officials to engage in viewpoint discrimination against student athletes. However, this formulation is overly abstract, and also misleading.

(App. 12a).

Further, without anything except opinions of sportswriters and professional athletes to support its conclusions, the Sixth Circuit identifies two problems with the petition, both of which relate to content. The petition "undermined his ability to lead the team" and "threatened team unity." (App. 24a). The conclusion itself is flawed. Given the fact that more than half of the team signed the petition and only four refused, a reasonable conclusion is that Euverard had already lost the ability to lead the team and that the players were unified – against him. Irrespective of this *non*

sequitur, this conclusion demonstrates the panel's own disapproval of Petitioner's message, a normative decision that coaches should not be questioned. Under the Sixth Circuit's analysis, a student-athlete could apparently circulate a petition that was complimentary of a coach because this would strengthen the coach's ability to lead and would promote team unity. But critics – however justified in their hatred of a coach – could not. Such blatant viewpoint discrimination is inconsistent with the long line of cases since *Barnette*, and it guts *Tinker*.

B. Joining the Eighth Circuit, the Sixth Circuit dispensed with *Tinker's* requirement that there be evidence of substantial and material interference with the operation of the school.

In *Tinker*, the Court addressed the district court's conclusion that the school officials' action "was reasonable because it was based upon their fear of a disturbance from the wearing of the armbands." The Court stated:

> But, in our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression. Any departure from absolute regimentation may cause trouble. Any variation from the majority's opinion may inspire fear. Any word spoken, in class, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument or cause a disturbance. But our Constitution says we must take this risk,...

Tinker, 393 U.S. 508-09 (citing *Terminiello v. Chicago*, 337 U.S. 1 (1949)). *See also Texas v. Johnson*, 491 U.S. at 409 (holding that "[o]ur precedents do not countenance. . . a presumption" that government may prohibit speech on the basis that "an audience takes serious offense at particular expression"). Therefore, as the Third Circuit has held, the "substantial disruption" standard in *Tinker* mandates "a specific and significant fear of disruption, not just some remote apprehension of disturbance." *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 211 (3d Cir. 2001) (Alito, J).

Under *Tinker*, the burden of demonstrating facts showing an actual or reasonable forecast of a substantial disruption rests with the school officials. 393 U.S. at 508. The Sixth Circuit erred in its analysis, first, by shifting this burden to the Petitioners. (App. 43a-44a) (Gilman, J., concurring) ("[The lead opinion] gives lip service to the correct standard under *Tinker* – that the forecast of substantial disruption be reasonable – but then fails to apply the standard correctly. Instead, it improperly places the burden on the students to prove that there would not have been a disruption.").

Secondly, the Sixth Circuit did not consider whether the speech of the students interfered with appropriate discipline "in the operation of the school," assuming that speech which allegedly disrupts "team unity" alone is unprotected under *Tinker*. ("Defendants must show that it was reasonable for them to forecast that the petition would disrupt *the team.*") (App. 21a) (emphasis added).

Third, the panel erred by relying upon speculation of disruption. (App. 44a) (Gilman, J., concurring) ("generalized fear of disruption to team unity ... not enough to meet the 'substantial disruption' standard of *Tinker*"). Notably, the Sixth Circuit appears to acknowledge that "the petition did not in fact disrupt the team." (App. 18a). Moreover, the panel does not offer any specific examples of how the speech at issue *substantially* disrupted or could have *substantially* disrupted school operations. Giles and Dooley circulated the petition over the course of three days without incident. Respondents acknowledge that the boys did not circulate the petition during class, team meetings, practice, or games. The boys did not boycott, or threaten to boycott, practices or games. There is no evidence that they refused to execute a single football play. At the time of the interrogations, the petition had existed for a week, and no disruption whatsoever had been caused. Neither Euverard nor the other school officials had ever seen the petition and did not know whether two, twenty-two, or all thirty-seven players had signed it. In fact, one assistant coach testified that he did not have any evidence that the petition interfered with academic or football operations at all.

Moreover, the boys provided unrebutted testimony that they continued to give one hundred percent effort. Petitioners testified that they played for themselves and their teammates, despite their personal feelings about Euverard. There is no evidence in the record that the speech was disruptive of school operations at all, a crucial undisputed fact which the Sixth Circuit ignores entirely. In so doing, the panel relieves Respondents of their burden under *Tinker* of coming forth with actual evidence, such as past arguments

between players or players boycotting practice.[7] If any disruption was caused *later*, it was the fault of a paranoid coach, who was willing to sacrifice students as necessary. (App. 44a) (Gilman, J., concurring) ("[A] review of the record shows that there was no possibility of disruption or interference, nor did the players intend that there be one, until Euverard found out about the petition, became upset, and decided to 'smoke out' the culprits and dismiss them from the team.").

The Sixth Circuit misconstrues Petitioners' argument. Petitioners do not argue that *Tinker* requires an actual disruption of school operations before a school official takes measured, appropriate action. Instead, Petitioners argue that these facts – demonstrating no disruption at all – existed at the time Euverard punished the supposed "ringleaders," and these facts undercut any reasonable prediction of a disturbance. In contrast to situations where past evidence of disruption justified a reasonable prediction of future problems, there is no evidence in the record that petitions at JCHS had ever caused a disturbance. Given the dearth of evidence, it would have simply been unreasonable to forecast either a "material" or a "substantial" disruption. (App. 44a-45a) (Gilman, J., concurring). At the very least, these facts demonstrate that there is an issue of triable fact relating to the

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[7] By contrast, *see Pinard*, where the players refused to participate in a basketball game and *Wildman*, where the player advocated a "giv[ing] him [the coach] back some of the bullshit that he has given us." *Pinard*, 467 F.3d at 768-69, *Wildman*, 249 F.3d at 770.

reasonableness of a forecast of material and substantial disruption.[8]

The Sixth Circuit's decision also replaces the high hurdle of "material and substantial" disruption of school operations with the low hurdle of "team unity." As Judge Gilman notes, "[v]ague notions of 'teamwork' and 'unity' are simply not compelling school interests in the way that prevention of drug use is." (App. 42a). Quashing dissent can always be justified with appeals to the need for "unity," and calls for national unity or school unity could have been used to prohibit the students in *Tinker* from expressing their views. But that simply is not the line which this Court has drawn.

Further, the Sixth Circuit's decision allows school officials to define an "educational mission" to fit their own preferences – "team unity" – then use this amorphous term as a constitutional trump card to ban any speech that is contrary to the mission.[9] This analytical error is compounded by the panel's use of "common-sense conclusions" as a proxy for actual evidence. Instead of requiring proof of disruption, the

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[8] By failing to construe the facts in a light most favorable to Petitioners, the panel deviates from the standard to be applied on summary judgment in qualified immunity cases. *Scott v. Harris*, 127 S. Ct. 1769, 1774 (2007). A reasonable jury could find that the petition was cathartic, allowing the players to ignore Euverard, play for each other in spite of his outrageous treatment, and soldier on for the remainder of the season in hopes that the principal would replace Euverard at year end.

[9] Recently, the Supreme Court expressly rejected this argument for restricting student speech. *See Morse*, 127 S. Ct. at 2637 (Alito, J., concurring).

panel relies upon a scene from *Hoosiers*, the opinions of sportswriters and professional athletes, and two hypothetical situations – a player giving a coach "lip" and a student making a "smart aleck" remark to a teacher.[10] Then, having set up these constitutional straw men, the panel tears them down through reliance upon supposed "common-sense" conclusions, citing a Supreme Court case unrelated to *student* speech.[11]

Ironically, the Sixth Circuit had recently rejected just such a flawed analysis in the area of commercial speech. *Pagan v. Fruchey*, 492 F.3d 766, 778 (6th Cir. 2007) (*en banc*) (refusing to permit a municipality to avoid its evidentiary burden of justifying the restriction on speech with "common-sense" assertions, stating, "[a] judicial pronouncement that an ordinance is consistent with common sense hardly establishes that it is so"). Thus, claims of common sense cannot replace evidence, and a proper application of *Tinker* in this case would have resulted in a finding of protected speech.

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[10] Notably, there is not one shred of evidence that Petitioners gave Euverard "lip" or made any "smart aleck" remark to him.

[11] In *TSSAA v. Brentwood Acad.*, the Court reached the "common sense conclusion" that hard sell tactics directed at "impressionable middle school athletes" "strikes nowhere near the heart of the First Amendment." 127 S. Ct. 2489, 2493 (2007). That is a far cry from *Tinker*, where a governmental actor must demonstrate evidence of "material and substantial disruption" in order to restrict student speech.

C. There is a conflict among the circuits on this issue.

In concluding that the Petitioners' speech falls outside the protection of the First Amendment, the Sixth Circuit relied heavily upon *Wildman*, discussed above. There, the Eighth Circuit held that a student could be punished for engaging in "insubordinate speech" that threatens "team unity" and "the cohesiveness of the team" even without proof of disruption. In *Wildman*, a female basketball player wrote a letter to other members of the team criticizing the head coach for not letting her play on the varsity. Although the letter included the word "bulishit," which would have justified restrictions under *Fraser*, the Eighth Circuit did not end its analysis there. The *Wildman* court found that the letter "constitute[d] insubordinate speech toward her coaches." 249 F.3d at 772. At the same time, the *Wildman* court impliedly acknowledged that "there was no specific evidence of a material disruption of a school activity." *Id.* at 771.

In contrast, the Second, Third, Ninth, and Tenth circuits have held that evidence of disruption is required. An illustrative case is *Seamons*, discussed above, in which the Tenth Circuit applied *Tinker* to a claim by a football player who was dismissed from the team. After the player said he was not going to apologize for reporting a hazing incident, the coach kicked the player off of the team. 84 F3d at 1237. Applying *Tinker*, the court found there was no evidence that the speech disrupted class work and rejected the school system's generalized "fear of a disturbance stemming from the disapproval associated with Brian's unpopular viewpoint regarding hazing in

the school's locker rooms." *Id.* at 1238. The Tenth Circuit held that such claimed fear was not sufficient under *Tinker* to "punish Brian's speech. . . ." *Id.*

The Second, Third, and Ninth Circuits have analyzed the issue similarly. *Guiles v. Marineau*, 461 F.3d 320, 331 (2d Cir. 2006) (concluding that school censorship of images on student's T-shirt violated *Tinker* because the shirt did not cause any disruption), *Saxe*, 240 F.3d at 216-17 (concluding that school policy violated *Tinker* because it punishe[d] "not only speech that actually causes disruption, but also speech that merely intends to do so. . . "); *Pinard*, 467 F.3d at 768 (holding that, under *Tinker*, petition calling for resignation of coach and verbal complaints to administrative officials were protected because they did not disrupt school activities).

Because of this disagreement among the circuits and because the requirement of evidence is crucial to maintain the integrity of *Tinker*, the petition should be granted.

IV. The Petition Should Be Granted To Clarify That A Student's Right To Criticize An Abusive School Official Without Disruption Is Clearly Established

The petition should also be granted so that the Court can clarify that Petitioners right was clearly established. In *Tinker*, this Court expressly stated that a public school student's right to freedom of speech applies not only in the classroom but "in the cafeteria," "on the campus during authorized hours," and "on the playing field." 393 U.S. at 512-13. To determine

whether a constitutional right is clearly established, this Court has said that the contours of the right must be "sufficiently clear that a reasonable official would understand that what he is doing violates the right." *Saucier v. Katz*, 533 U.S. 194, 2002 (2001). This does not mean that the "very action in question has previously been held unlawful," and "officials can still be on notice that their conduct violates established law even in novel factual circumstances." *Hope v. Pelzer*, 536 U.S. 730, 739, 741 (2002). The only requirement is that, "in the light of pre-existing law, the unlawfulness must be apparent." *Id.* at 739. Given this standard and the express language of *Tinker*, the District Court was correct in concluding that Petitioner's right to prepare, circulate, and sign the petition was clearly established on October 10, 2005.

CONCLUSION

For each of these reasons, Petitioners respectfully request that the Court grant the petition for a writ of certiorari. If this decision is allowed to stand, students will be reluctant to act as whistleblowers on any kind of wrongdoing by a coach or teacher – sexual abuse, physical abuse, or harassment – lest they be punished for doing so. The serious ramifications of the Sixth Circuit's decision call for review.[12]

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[12] Reports of sexual and physical abuse by teachers and coaches has been well-documented in news reports. *Speaking Up About Sexually Abusive Coaches*, ABC News, Oct. 15, 2004, http://abcnews.go.com/2020/News/Story?id+165510&page=1; *Coaches Who Prey*, The Seattle Times, Dec. 14-17, 2003, http://seattletimes.nwsource.com/news/local/coaches/. According to one survey of high school graduates, 17.7% of males and 82.2 % of females reported sexual harassment by teachers or staff during

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their school careers. Over 13% of those surveyed said they had engaged in sexual intercourse with a teacher. Wishnietsky, "Reported and Unreported Teacher-Student Harassment," Journal of Research, Vol. 3, 1991, pp. 164-69.

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 06-6172

[Filed August 3, 2007]

JEFF LOWERY, individually and as next friend of Derrick "Rabbit" Lowery, LISA A. LOWERY, individually and as next friend of Derrick "Rabbit" Lowery, RANDY GILES, individually and as next friend of Jacob Giles, STACEY GUTHRIE, individually and as next friend of Joseph Dooley, JAMES SPURLOCK, individually and as next friend of Dillan Spurlock, LORA SPURLOCK, individually and as next friend of Dillan Spurlock,
Plaintiffs-Appellees,

v.

MARTY EUVERARD, DALE SCHNEITMAN, CRAIG KISABETH, JEFFERSON COUNTY BOARD OF EDUCATION,
Defendants-Appellants.

Appeal from the United States District Court for the Eastern District of Tennessee at Knoxville.
No. 05-00560—Thomas W. Phillips, District Judge.

Argued: April 24, 2007

Decided and Filed: August 3, 2007

Before: SILER and GILMAN, Circuit Judges; ZATKOFF, District Judge.*

COUNSEL

ARGUED: Linda J. Hamilton Mowles, LEWIS, KING, KRIEG & WALDROP, Knoxville, Tennessee, for Appellants. Matthew M. Scoggins III, BASS, BERRY & SIMS, Knoxville, Tennessee, for Appellees. **ON BRIEF:** Linda J. Hamilton Mowles, LEWIS, KING, KRIEG & WALDROP, Knoxville, Tennessee, for Appellants. Matthew M. Scoggins III, Michael S. Kelley, BASS, BERRY & SIMS, Knoxville, Tennessee, for Appellees.

ZATKOFF, D. J., delivered the opinion of the court, in which SILER, J., joined. GILMAN, J. (pp. 17-21), delivered a separate opinion concurring in the judgment.

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* The Honorable Lawrence P. Zatkoff, United States District Judge for the Eastern District of Michigan, sitting by designation.

OPINION

LAWRENCE P. ZATKOFF, District Judge. Plaintiffs brought suit in federal court after they were dismissed from their high school football team. Defendants brought a motion for summary judgment based on qualified immunity, which the district court denied. On appeal, Defendants argue that Plaintiffs' dismissal was permissible under the rule governing student speech set forth in *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969). For the reasons set forth below, we **REVERSE** the district court's denial of Defendants' motion for summary judgment.

I. BACKGROUND

A. Factual background

Derrick Lowery, Jacob Giles, Joseph Dooley, and Dillon Spurlock (hereinafter "Plaintiffs") were students at Jefferson County High School in Tennessee during the 2005-06 school year.[1] All four were members of the Jefferson County varsity football team. Defendant Euverard became the head varsity football coach at Jefferson County in 2004. During the 2005 season, many of the Jefferson County football players, including Plaintiffs, became dissatisfied with Euverard's coaching methods. Plaintiffs allege that Euverard struck a player in the helmet, threw away college recruiting letters to disfavored players, humiliated and degraded players, used inappropriate

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[1] The players' next friends brought suit on behalf of the players; for convenience the Court will refer to the players as Plaintiffs.

language, and required a year-round conditioning program in violation of high school rules.

In early October of 2005, after discussions with Dooley and Lowery, Giles typed the following statement: "I hate Coach Euvard [sic] and I don't want to play for him." JA at 745. Giles and Dooley asked other players to sign the petition, which would be held until after the football season. Giles and Dooley intended to then give the petition to Defendant Schneitman, the principal of Jefferson County, in order to have Euverard replaced as head coach. JA at 580. Eighteen players eventually signed the petition, including Spurlock.

Euverard learned of the petition on October 7, 2005. Darren Whitehead, another player on the team, told Assistant Coach Ricky Upton about the petition, who then told Euverard. Euverard called an all-coaches meeting on October 9. Schneitman was also present at the meeting. At the meeting, the coaches discussed how to deal with the petition. The coaches decided to question the players individually to learn more about the petition.

When the players arrived for practice on October 10 they were told to sit in front of their lockers and remain quiet. Players were then taken one by one into an office in the weight room where they were interviewed by Euverard. Assistant Coach Brimer was also present in the office, taking notes. All the players were asked the same questions: (1) Have you heard about the petition?, (2) Did you sign it?, (3) Who asked you to sign it?, and (4) Do you want to play football with Coach Euverard as coach?

When Wesley Lee, a player who had signed the petition, was called for his interview, Lowery called out "are you alright?" Assistant Coach Pippenger then asked Lowery to come over. At first Lowery refused, and then walked over to Pippenger. Lowery told Pippenger "don't put your hands on me," or words to that effect, and refused to go outside with Pippenger. Giles and Dooley then got up and stood by Lowery. Pippenger took the three of them into the weight room, and told Euverard about the situation. Euverard attempted to interview the three boys individually, but they said they would only meet with Euverard as a group. Euverard told them that if they were going to be that way, they could pick up their things and leave. Giles, Dooley, and Lowery gathered their belongings and left. As they were leaving, Dooley said to the other players "I know how much you hate him, and you guys need to leave with us right now." JA at 673.

Spurlock was not at school on October 10. Euverard interviewed Spurlock on October 11, and Spurlock told Euverard that he signed the petition. Euverard asked Spurlock if he still felt that way, and Spurlock answered that he loved football. Euverard then asked Spurlock if he wanted to play football with Euverard as head coach. Spurlock said no, but that he wanted to play for Jefferson County. Euverard told Spurlock to get his stuff, and that he was no longer on the team. Players who signed the petition but apologized to Euverard and told him they wanted to play for him were allowed to remain on the team.

B. Procedural background

Plaintiffs filed suit on December 9, 2005. The district court denied Defendants' motion for summary judgment based on qualified immunity on August 22, 2006, holding that there was an issue of fact regarding whether the petition disrupted the team. Defendants timely appealed the denial to this Court.

II. ANALYSIS

A. Standard of review

A district court's denial of qualified immunity is reviewed *de novo*. *Blake v. Wright*, 179 F.3d 1003, 1007 (6th Cir. 1999).

B. Jurisdiction

A denial of qualified immunity based on legal grounds is an appealable final decision within the meaning of 28 U.S.C. § 1291. *Sample v. Bailey*, 409 F.3d 689, 694 (6th Cir. 2005). However, a denial of qualified immunity based on evidentiary issues is not an appealable decision. *Id.* at 695. Plaintiffs argue that there are contested evidentiary issues regarding the real reason why they were dismissed from the football team.

Plaintiffs do not deny, however, their participation in the petition in question. Nor do Plaintiffs Lowery, Giles, and Dooley dispute their insubordinate actions during the team meeting on October 10, 2005. The amount of constitutional protection due the petition is

a legal question properly before the Court on interlocutory appeal.

C. Application of *Tinker* to the petition

A two-part test is used to determine if a government official is entitled to qualified immunity. First, the Court must determine if the official's conduct violated a constitutional right. If this question is answered in the affirmative, the Court must determine if the right was clearly established at the time of the violation. *Garretson v. City of Madison Heights*, 407 F.3d 789, 796 (6th Cir. 2005). Thus, the Court must first determine if Plaintiffs' First Amendment rights were violated when they were dismissed from the football team.

In the 1986 movie *Hoosiers*, Gene Hackman plays Norman Dale, the new basketball coach at a small Indiana high school. On the first day of practice Dale makes an introductory speech to the players. All of the players attentively listen to Dale except two, who are talking to each other. Dale notices the two players talking, and the following dialogue ensues:

> Dale: Basketball is a voluntary activity. It's not a requirement. If any of you feel you don't want to be on the team, feel free to leave right now. Did you hear what I just said?
>
> Player: Me?
>
> Dale: Yes, you.

Player: Sure, I'm just kinda curious to know when we start.

Dale: We start when I say so.

Player: Ok, would you kinda let me know, 'cause I'm kinda getting tired of standing.

Dale: Alright. Out. Out of here. Right now.

The two players then leave the gym. Shortly thereafter one of the players returns with his father, who informs Dale that his son has something to say. The player apologizes to Dale and asks for a second chance. Dale accepts the apology and tells the player to suit up. The other player is not heard from again.

The movie takes place in the 1950s, before the Supreme Court case of *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969), which held that the First Amendment does not stop "at the schoolhouse gate." *Id.* at 507. Assuming that *Tinker* was in force at the time of *Hoosiers*, would the players have a First Amendment claim against Coach Dale? That hypothetical case is not before the Court, but the instant case, although it contains different facts, presents a similar question: what is the proper balance between a student athlete's First Amendment rights and a coach's need to maintain order and discipline?

The contour of First Amendment protection given to speech depends upon the context. For example, it is beyond question that citizens have a First Amendment right to criticize the government's military policy. However, does this mean that an enlisted soldier has

a First Amendment right to be disrespectful towards his commanding officer? To ask that question is to answer it. Likewise, citizens have a First Amendment right to criticize a particular government official, but that right is circumscribed when the citizen works for the official. *See Connick v. Meyers*, 561 U.S. 138 (1983).

The First Amendment rights of students are also limited. Of course, it is axiomatic that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker*, 393 U.S. at 507. However, the Supreme Court has also held that "the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings." *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 682 (1986). Furthermore, the constitution does not compel "school officials to surrender control of the American public school system to public school students." *Id.* at 686 (quoting *Tinker*, 393 U.S. at 526 (Black, J., dissenting)).

The limitation on students' First Amendment rights derives from the mission of the public school system. "The primary duty of school officials and teachers . . . is the education and training of young people. . . . Without first establishing discipline and maintaining order, teachers cannot begin to educate their students." *N.J. v. T. L.O.*, 469 U.S. 325, 350 (1985) (Powell, J., concurring). Public schools are necessarily not run as a democracy. Schools exist to provide a forum whereby those with wisdom and experience (the teachers) impart knowledge to those who lack wisdom and experience (the students). Unlike our system of government, the authority

structure is not bottomup, but top-down. The authority of school officials does not depend upon the consent of the students. To threaten this structure is to threaten the mission of the public school system.

However, while public schools are not run as democracies, neither are they run as Stalinist regimes. Students do have First Amendment rights, and school officials do not have unfettered authority to regulate student speech. The Supreme Court has established three frameworks for evaluating student speech: (1) vulgar and obscene speech is governed by *Bethel School Dist. v. Fraser*, 478 U.S. 675 (1986); (2) school-sponsored speech is governed by *Hazelwood v. Kuhlmeier*, 484 U.S. 260 (1988); and (3) all other speech is governed by *Tinker*.

The parties agree that the instant case is governed by *Tinker*. Pursuant to *Tinker*, school officials may regulate speech that materially and substantially interferes "with the requirements of appropriate discipline in the operation of the school." *Tinker*, 393 U.S. at 513. However, *Tinker* does not prescribe a uniform, "one size fits all" analysis. The Court must consider the content and context of the speech, and the nature of the school's response.

The speech in question in this case occurred in the context of a high school football program. It is well-established that students do not have a general constitutional right to participate in extracurricular athletics. *See Brentwood Academy v. Tennessee Secondary Sch. Athletic Ass'n*, 180 F.3d 758, 763 (6th Cir. 1999), *rev'd on other grounds*, 531 U.S. 288 (2001); *Alerding v. Ohio High School Athletic Ass'n.*, 779 F.2d

315 (6th Cir 1985); *Angstadt v. Midd-West Sch. Dist.*, 377 F.3d 338 (3d Cir 2004); *Niles v. University Interscholastic League*, 715 F.2d 1027 (5th Cir. 1983). As this Court has noted, "[t]he main purpose of high school is to learn science, the liberal arts and vocational studies, not to play football and basketball." *Crocker v. Tennessee Secondary Sch. Athletic Ass'n*, 980 F.2d 382, 387 (6th Cir. 1992).

The Supreme Court has held that student athletes are subject to more restrictions than the student body at large. *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 657 (1995). This greater degree of oversight is due to the differing natures of the classroom and playing field. One of the purposes of education is to train students to fulfill their role in a free society. Thus, it is appropriate for students to learn to express and evaluate competing viewpoints. The goal of an athletic team is much narrower. Of course, students may participate in extracurricular sports for any number of reasons: to develop discipline, to experience comradery and bonding with other students, for the sheer "love of the game," etc. Athletic programs may also produce long-term benefits by distilling positive character traits in the players. However, the immediate goal of an athletic team is to win the game, and the coach determines how best to obtain that goal. As this Court has recognized:

> Unlike the classroom teacher whose primary role is to guide students through the discussion and debate of various viewpoints in a particular discipline, [the role of a coach] is to train his student athletes how to win on the court. The

> plays and strategies are seldom up for debate. Execution of the coach's will is paramount.

Dambrot v. Central Mich. Univ., 55 F.3d 1177, 1190 (6th Cir. 1995).

The above considerations require the Court to carefully frame the issue for determination in the instant case. The issue is not whether the Court approves of Euverard's methods, or whether it thinks Plaintiffs' dismissal from the team was fair. The Supreme Court has held that:

> It is not the role of the federal courts to set aside decisions of school administrators which the court may view as lacking a basis in wisdom or compassion. . . . The system of public education that has evolved in this Nation relies necessarily upon the discretion and judgment of school administrators and school board members, and § 1983 was not intended to be a vehicle for federal-court corrections of errors in the exercise of that discretion which do not rise to the level of violations of specific constitutional guarantees.

Wood v. Strickland, 420 U.S. 308, 326 (1975).

Plaintiffs suggest that the issue is whether it is permissible for school officials to engage in viewpoint discrimination against student athletes. However, this formulation is overly abstract, and also misleading. This case is not primarily about Plaintiffs' right to express their opinions, but rather their alleged right to belong to the Jefferson County football team on their

own terms. The specific question presented by this case is whether Plaintiffs had a right to remain on the football team after participating in a petition that stated "I hate Coach Euvard [sic] and I don't want to play for him."

Plaintiffs rely primarily on *Pinard v. Clatskanie Sch. Dist. 6J*, 467 F.3d 755 (9th Cir. 2006), and *Seamons v. Snow*, 206 F.3d 1021 (10th Cir. 2000). In *Pinard*, high school basketball players alleged they had been physically and psychologically intimidated by their coach. Aware of the players' dissatisfaction, the coach told them "if they wanted him to quit, they should say so, and he would resign." *Pinard*, 467 F.3d at 760. In response, the players prepared and signed a petition calling for the resignation of the coach. All the players except the coach's son signed the petition. The players then refused to participate in the next basketball game, and were dismissed from the team. The Ninth Circuit held that the players' petition was permitted by *Tinker*, but not the refusal to participate in the game. *Id.* at 768-69.

In *Seamons*, a high school football player was attacked by four of his teammates and tied to a towel rack with highly adhesive athletic tape. Another teammate brought one of the player's exgirlfriends into the locker room to watch the proceedings. The player reported the incident to the police and school authorities. The coach told the player he needed to apologize to the team for reporting the incident. When he refused, he was dismissed from the team. The Tenth Circuit overruled the district court's grant of summary judgment for the defendants, holding that there were genuine issues of material fact regarding

whether the player's First Amendment rights were violated.

Defendants rely primarily on *Wildman v. Marshalltown*, 249 F.3d 768 (8th Cir. 2001). In *Wildman*, a high school basketball player was upset by her coach's failure to promote her to the varsity team. She distributed a letter to her teammates, containing the following language:

> I think that we have to fight for our position. Am I the only one who thinks that some of us should be playing Varsity or even JV? We as a team have to do something about this. I want to say something to Coach Rowles. I will not say anything to him without the whole teams [sic] support. He needs us next year and the year after and what if we aren't there for him? It is time to give him back some of the bullshit that he has given us. We are a really great team and by the time we are seniors and we ALL have worked hard we are going to have an AWESOME season. We deserve better then [sic] what we have gotten. We now need to stand up for what we believe in!!!

Id. at 770. After the coach became aware of the letter, he demanded that the player apologize. The player refused, and was dismissed from the team. The player argued that the letter was protected by *Tinker*, because it "was a personal communication to other students containing her personal expression." *Id.* at 771. The school officials argued that they had an interest in affording the team "an educational environment conducive to learning team unity and

sportsmanship and free from disruptions and distractions that could hurt or stray the cohesiveness of the team." *Id.* The Eighth Circuit held that the player's letter constituted "insubordinate speech toward her coaches." *Id.* at 772. The Eighth Circuit further held that:

> The school did not interfere with Wildman's regular education. A difference exists between being in the classroom, which was not affected here, and playing on an athletic team when the requirement is that the player only apologize to her teammates and her coach for circulating an insubordinate letter. We agree with the district court's conclusions that the letter did suggest, at the least, that the team unite in defiance of the coach (where Wildman wrote that the coach "needs us next year and the year after and what if we aren't there for him?" and "it is time to give him back some of the bullshit that he has given us" and "we now need to stand up for what we believe in" and "I think that we have to fight for our position") and that the actions taken by the coaches in response were reasonable. Moreover, coaches deserve a modicum of respect from athletes, particularly in an academic setting.

Id.

Plaintiffs argue that the problem with the *Wildman* letter was the use of the word "bullshit," but that is not an accurate summation of the Eighth Circuit's reasoning. The Eighth Circuit did cite the word "bullshit" as an example of the letter's

inappropriateness, but also noted that the suggestion that the team unite in defiance of the coach was insubordinate. The Eighth Circuit cited both *Tinker* and *Fraser* (which governs obscene speech), and did not specify which framework it was using. However, the district court opinion, which the Eighth Circuit affirmed, found that the letter "materially interfered [with] or substantially disrupted a school activity," which is the *Tinker* standard.

Under Plaintiffs' reasoning, the *Wildman* letter would have acceptable had it not contained the word "bullshit," and the instant petition is acceptable because it does not contain any obscenity. However, this conclusion elevates form over substance, and misses the point of the Eighth Circuit's reasoning. Even if the *Wildman* letter had not contained obscenity, the suggestion that the team unite in defiance of the coach would still have been insubordinate. Likewise, the instant petition constituted a direct challenge to Coach Euverard's authority. While the instant petition does not contain obscenity, it does contain strong language: "I hate Coach Euvard [sic]." "Hate" is one of the strongest words in the English language, and carries particularly negative connotations: crimes motivated by bigotry are termed "hate" crimes.

Furthermore, the instant petition contained a stronger challenge to the coach's authority than the *Wildman* letter. Plaintiff Giles, who typed the petition, stated that purpose of the petition was to have Euverard replaced as head coach. JA at 580. In contrast, while the *Wildman* author was clearly dissatisfied with her coach's decisions, there is no

indication that she wanted to have the coach fired, and she stated that she was not advocating a strike or boycott. *Wildman*, 249 F.3d at 770. The *Wildman* author also stated that she would not say anything to the coach without the whole team's support.

Both *Seamons* and *Pinard* present very different scenarios. The player in *Seamons* did not attempt to have his coach fired; he reported a serious matter, an assault, to the authorities. In *Pinard*, the players prepared a petition calling for their coach's resignation after he invited them to say if they wanted him to quit, and the coach *did not dispute* the players' claim that the petition was not disruptive. This is a crucial distinction from the instant case: the coach in *Pinard* voluntarily put his authority into play, so to speak. This is entirely consistent with the top-down authority structure discussed above: coaches have the prerogative to open up the question of their authority if they so choose. But this does not mean that the players have a corresponding right to unilaterally undertake a referendum on the coach's authority. Creating the latter right would be tantamount to establishing a bottom-up authority structure for high school athletics. A high school athletic team could not function smoothly with an authority structure based on the will of the players. As this Court has recognized, the team's "plays and strategies are seldom up for debate. Execution of the coach's will is paramount." *Dambrot*, 55 F.3d at 1190. Thus, the facts of the instant case are far more analogous to *Wildman* than to *Seamons* or *Pinard*, supporting the conclusion that there was no constitutional violation in Plaintiffs' dismissal from the football team.

Plaintiffs argue that Defendants are not entitled to summary judgment because there is an issue of fact regarding whether the petition substantially disrupted the team. In support of this argument, Plaintiffs point to their claim that the petition did not in fact disrupt the team. However, this argument misapplies the *Tinker* standard: *Tinker* does not require school officials to wait until the horse has left the barn before closing the door. Nor does *Tinker* "require certainty that disruption will occur." *Pinard*, 467 F.3d at 767.

This principle is illustrated in the Ninth Circuit case *Lavine v. Blaine Sch. Dist.*, 257 F.3d 981 (9th Cir. 2001). A high school student handed in a poem depicting, in the first person, a shooting massacre at the school. The student had previous disciplinary problems, and had told a school counselor his thoughts about suicide. The school contacted the police department and a psychiatrist from the Community Mental Health Crisis Line. A deputy sheriff went to the student's home to evaluate him. The student told the deputy that "he had no access to weapons and had no intention of carrying out any of the acts in the poem." *Id.* at 985. The student's mother assured the deputy that the student "had no access to weapons and was not a danger to himself or others." *Id.* The deputy concluded that there was no probable cause to have the student involuntarily committed for psychological evaluation, and reported his observations to the psychiatrist.

Based on his conversations with the deputy and school officials, the psychiatrist concluded that, in his professional opinion, "there were insufficient grounds for anyone to make a determination that [the student]

was in imminent danger of causing serious harm to himself or others." *Id.* Accordingly, the psychiatrist concurred with the deputy's decision to not commit the student. However, after meeting and discussing the situation, school officials decided to order the emergency expulsion of the student. The student subsequently filed suit.

The district court denied the school's motion for summary judgment on the issue of whether the emergency expulsion violated the student's First Amendment rights. On appeal, the Ninth Circuit reversed. The Ninth Circuit noted that:

> In retrospect, it may appear that, as [the student's] mother predicted, the school overreacted. [The student] very well may have been using his poetry to explore the disturbing topic of school violence and chose to do so through the perspective of a suicidal mass murderer. In fact, [the student] strongly contends this was all he was doing and that he had no intention of hurting himself or others.

Id. at 991. However, the Ninth Circuit also noted that schools have a duty to prevent disturbances, and "forecasting disruption is unmistakably difficult to do." *Id.* at 989. The Ninth Circuit further noted that "*Tinker* does not require certainty that disruption will occur," and held that based on the circumstances, it was reasonable for school officials "to forecast a substantial disruption of or material interference with school activities." *Id.* at 989, 992.

The circumstances in *Lavine* were far graver than those in the instant case. However, *Lavine* is relevant because it demonstrates the proper application of the *Tinker* standard. If *Tinker* required certainty that disruption would occur, the school in *Lavine* would not have been entitled to summary judgment, as a deputy and psychiatrist concluded that there were insufficient grounds to determine that the student posed a threat to himself or others. However, *Tinker* does not require certainty, only that the forecast of substantial disruption be reasonable. Thus, Plaintiffs' self-serving claim that the petition did not substantially disrupt the team does not preclude a grant of summary judgment for Defendants.

Plaintiffs argue that the Court may not rely on Defendants' self-serving claims. However, this argument again misunderstands the *Tinker* standard. This case does not hinge on a "he said/she said" conflict, because *Tinker* does not require disruption to have actually occurred. Thus, the Court need not choose between dueling sets of self-serving statements regarding the existence of disruption. Rather, the Court must evaluate the circumstances to determine if Defendants' forecast of substantial disruption was reasonable. This principle is further illustrated in this Court's recent decision in *D.B. v. Lafon*, No. 06-5982, 2007 U.S. App. LEXIS 3886 (6th Cir. 2007). The plaintiffs brought suit after they were prohibited from wearing clothing depicting the Confederate flag to school. The district court denied the plaintiffs' motion for a preliminary injunction, finding that they could not demonstrate a likelihood of success on the merits. On appeal, the plaintiffs argued that the district court erred in focusing on the *potential* for disruption. *Id.* at

*10. However, this Court noted a history of racial tension at the school, and held that:

> Even assuming that no students' wearing of that symbol had caused a disruptive incident in the past, the district court nonetheless reasonably could conclude that displays of the Confederate flag would be likely to lead to unrest in the future. Such a determination is not erroneous as either a factual finding or a *legal conclusion*.

Id. at *12-13 (emphasis added). This Court also noted that although a brawl had not broken out over the flag, the school was not obligated to sit and wait for one before acting. *Id.* at 17 (citing *West v. Derby Unified Sch. Dist. No. 260*, 206 F.3d 1358, 1366 (10th Cir. 2000)).

Likewise, Defendants in the instant case were not obligated to wait until the petition substantially disrupted the team before acting, nor are they now required to demonstrate that it was certain that the petition would substantially disrupt the team. Rather, Defendants must show that it was reasonable for them to forecast that the petition would disrupt the team.

A member of the Jefferson County football team testified that a situation where players said they hated the coach and didn't want to play for him would have a substantially negative effect on a football team. Statements of that sort harm team unity, by dividing teammates into groups who support the coach and groups who don't. JA at 686. Assistant Coach Brimer also testified that a group of players saying they hated

the coach could definitely break apart a team. JA at 640.

Plaintiffs argue that the petition was not disruptive because they did not intend to present it to school officials until after the football season. However, Plaintiffs were circulating the petition amongst the team during the season; it is unrealistic to claim that there was no effect on the team simply because Plaintiffs intended to delay the presentation of the petition. Furthermore, the petition did in fact "become public" before the end of the season, and to argue that the coaches were prohibited from taking action because Plaintiffs did not intend them to know about it is to ignore the realities of the situation. The petition was admittedly part of a campaign to have Euverard fired, and he was not required to wait until the campaign was complete before acting.

Plaintiffs also argue that Defendants' fears regarding unity are too generalized to support a forecast that the petition would disrupt the team, and that they must provide more specific evidence. This argument is unpersuasive; abstract concepts like team morale and unity are not susceptible to quantifiable measurement, yet they undeniably have a large impact on a team.

The impracticality of the standard Plaintiffs are calling for is demonstrated through the following examples. Consider the scene from *Hoosiers* described above. Clearly, a player giving "lip" to a coach during practice is reasonably likely to disrupt a team. But how would a coach be able to "prove" this? One suggestion would be to poll the team. However, this

would be unworkable, as it would effectively place the coach's ability to discipline his players in the hands of the players themselves. This would be akin to "putting the inmates in charge of the asylum." By deciding amongst themselves that disrespectful and insubordinate actions are not disruptive to the team, the players could hamstring the coach's ability to maintain order and discipline.

As another example, suppose that a student was given a detention after making a smart aleck remark to a teacher. It is difficult to see how the teacher could "prove" that this one particular incident substantially disrupted the school. However, the incident would clearly negatively affect the school's overall ability to maintain order and discipline.

In both of the above examples, the students would be unable to succeed with their First Amendment claims, despite the school officials' likely inability to offer any "proof" beyond common-sense conclusions based on human experience. The Supreme Court recently noted that some common-sense conclusions do not require substantial evidentiary support:

> We need no empirical data to credit TSSAA's common-sense conclusion that hard-sell tactics directed at middle school students could lead to exploitation, distort competition between high school teams, and foster an environment in which athletics are prized more highly than academics.

Tenn. Secondary Sch. Athletic Ass'n v. Brentwood Acad., __ U.S. __, 127 S. Ct. 2489, 2495-96 (2007).

Similar common-sense conclusions support the determination, in the instant case, that Plaintiffs' petition was reasonably likely to cause substantial disruption on the Jefferson County football team.

The success of an athletic team in large part depends on its coach. The coach determines the strategies and plays, and "sets the tone" for the team. The coach, particularly at the high school level, is also responsible for providing "an educational environment conducive to learning team unity and sportsmanship and free from disruptions and distractions that could hurt or stray the cohesiveness of the team." *Wildman*, 249 F.3d at 771. The ability of the coach to lead is inextricably linked to his ability to maintain order and discipline. Thus, attacking the authority of the coach necessarily undermines his ability to lead the team. In the instant case, Plaintiff Spurlock admitted that signing the petition was equivalent to saying he had no respect for Euverard. JA at 569. As the Eighth Circuit noted in *Wildman*, coaches are entitled to respect from their players. *Wildman*, 249 F.3d at 772. Plaintiffs' circulation of a petition stating "I hate Coach Euvard [sic] and I don't want to play for him" was a direct challenge to Euverard's authority, and undermined his ability to lead the team. It could have no other effect.

In addition to challenging Euverard's authority, the petition threatened team unity. In most instances, school officials would be more likely to fire a coach who had a horrible season than one who had a successful season. Thus, players advocating the removal of a coach would have a powerful incentive to give less than one hundred percent. The Court is not accusing

Plaintiffs of this behavior; Plaintiffs all claim to have played their hardest despite their feelings for Euverard. However, after every missed block, dropped pass, or blown tackle, it would only be natural for other players, knowing the situation, to question Plaintiffs' motivation.[2] This would inevitably increase the tension on the team.

The circulation of the petition necessarily divided players into two camps, those who supported Euverard and those who didn't. Although team chemistry is impossible to quantitatively measure, it is instrumental in determining a team's success. Joakim Noah, a player on the University of Florida basketball team that won consecutive NCAA championships in 2006 and 2007, stated that "the difference between winning and losing is so, so small. . . . It's teams that really play together that win. Team chemistry is such a sensitive thing, but we really, really have it." Paola Boivin, *Gators Bare Their Championship Teeth*, ARIZONA REPUBLIC, Mar. 19, 2007, at 11.

Mutual respect for the coach is an important ingredient of team chemistry. The Detroit Tigers were the talk of the baseball world during the 2006 season, due to their remarkable turnaround and run to the

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[2] The infamous Chicago "Black Sox," who threw the 1919 World Series, were motivated in part by their dislike of the team's owner, Charles Comiskey. *See* ELIOT ASINOF, EIGHT MEN OUT (1963). When Coach Byron Scott was fired by the New Jersey Nets in January of 2004, there was widespread speculation that his players had mutinied against him. *See* Mark Heisler, *Desperate Times for Desperate Teams*, L.A. TIMES, Feb. 12, 2006, at D5.

World Series. An opposing player attributed the Tigers' success to "a manager they all trust and respect and that they are behind, and a team chemistry that seems pretty unified." John Lowe, *Add in Some Hot Bats, and the Tigers Have Found Their Swagger*, DETROIT FREE PRESS, Oct. 16, 2006, at 5. *See also* Mark Gaughan, *Expectations Low in an Uncertain Era*, BUFFALO NEWS, Sep. 7, 2006, at C11 ("I truly believe there is team chemistry. I believe the players truly believe and respect Coach Jauron."); David Boyce, *Central Missouri State Working for Series Title*, KANSAS CITY STAR, May 10, 2002, at D8 ("We have a deep respect for our coaches . . . We know they know what they are doing. We have a good team chemistry.").

Conversely, conflict between a player and the coach can shake "the very foundation of team chemistry." Greg Boeck, *Revolution on Court: Players' Defiance Upsets NBA Leadership Picture*, USA TODAY, Dec. 21, 2000, at C1. One sportswriter has noted that:

> The feud between [the player and coach] ultimately tore at the fabric of team chemistry and may have contributed to [the team's] postseason failure. At best, the constant discord created an uncomfortable atmosphere on the team. *At worst, it forced players to choose between a coach and a teammate, creating a fissure of distrust and disunity.*

Glenn Nelson, *Ready to Blow? Enigmatic George Karl Can't Understand Why He's Misunderstood*, SEATTLE TIME, Nov. 1, 1995, at H3 (emphasis added). Conflict between a player and coach has also been described as

a "cancer." Selena Roberts, *From Sleepless to Selfless*, NEW YORK TIMES, Dec. 10, 1996, at B13.[3]

The Court does not have an idealized, pristine view of athletic teams. Athletic teams are a family of sorts, and, like any family, it is inevitable that there will be some squabbles. Games are emotional affairs, and players and coaches may exchange angry words in the heat of the moment. From time to time, players may also vent their frustrations over play calls, lack of playing time, etc. The petition in this case, however, cannot be characterized as an isolated expression of dissatisfaction. The petition, stating "I hate Coach Euvard [sic] and I don't want to play for him" was part of a concerted effort to have Euverard fired. Such a petition would necessarily force players to choose between Euverard and the players that opposed him.

School officials have a duty to prevent disturbances. *Lavine*, 257 F.3d at 289. In the context of school athletics, this duty consists of providing "an educational environment conducive to learning team unity and sportsmanship and free from disruptions and distractions that could hurt or stray the cohesiveness of the team." *Wildman*, 249 F.3d at 771. Plaintiffs suggest that the initial meeting where Euverard questioned the players about the petition was itself a constitutional violation. This argument is without merit; it is based on the mistaken premise that *Tinker* requires actual disruption to occur before school officials may act. Under Plaintiffs' theory,

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[3] *See also* Lacy J. Banks, *Wilkins, NBA Coaches Deserve More Backing*, CHICAGO SUN-TIMES, Apr. 26, 2000.

school officials would be between the proverbial rock and hard place: either they allow disruption to occur, or they are guilty of a constitutional violation. Such a rule is not required by *Tinker*, and would be disastrous public policy: requiring school officials to wait until disruption actually occurred before investigating would cripple the officials' ability to maintain order.

School officials have an affirmative duty to not only ameliorate the harmful effects of disruptions, but to prevent them from happening in the first place. For Euverard and the other coaches to have turned a blind eye to a potential threat to team unity would have been a grave disservice to the other players on the team. It was therefore appropriate for the coaches to hold a meeting with the players regarding the petition. Plaintiffs Lowery, Giles, and Dooley do not dispute that they were insubordinate at the meeting, and Dooley admitted saying "I know how much you hate him, and you guys need to leave with us right now" to the other players. JA at 673.

"Forecasting disruption is unmistakably difficult to do"; thus, "*Tinker* does not require certainty that disruption will occur." *Lavine*, 257 F.3d at 989. Based on the circumstances, it was reasonable for Defendants to believe that the petition would disrupt the team, by eroding Euverard's authority and dividing players into opposing camps. This belief was bolstered by Plaintiffs' insubordinate and disruptive acts at the

team meeting.[4] Thus, the petition was not protected by *Tinker*, and Defendants did not violate Plaintiffs' First Amendment rights by removing them from the football team. Because there was no constitutional violation, it is not the Court's place to approve or disapprove of Euverard's actions.

This conclusion is supported by the analogous reasoning of the Supreme Court in *Connick v. Myers*, 461 U.S. 138 (1983). We recognize that *Connick* was decided in the context of government employment, using the standard laid down in *Pickering v. Board of Educ.*, 391 U.S. 563 (1968). Cases involving government employees are generally inapplicable to cases involving students. However, student athletes have greater similarities to government employees than the general student body. As discussed above, it is well-established that participation in athletics is not a constitutional right, and student athletes are subject to greater restrictions than the student body at large. The Supreme Court has noted that:

> By choosing to "go out for the team," [student athletes] voluntarily subject themselves to a degree of regulation even higher than that imposed on students generally. . . . Somewhat like adults who choose to participate in a "closely regulated industry," students who voluntarily participate in school athletics have

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[4] Plaintiff Spurlock was not present at the initial meeting. As described above, Spurlock met with Euverard the following day, where he reiterated his desire to not play for Euverard.

> reason to expect intrusions upon normal rights and privileges, including privacy.

Vernonia, 515 U.S. at 657 (quotation omitted).

There is a crucial distinction between the government regulating the citizenry in its sovereign capacity, and managing programs that citizens participate in voluntarily. "It is a long-settled principle that governmental actions are subject to a lower level of First Amendment scrutiny when 'the governmental function operating . . . [is] not the power to regulate or license, as lawmaker, . . . but, rather, as proprietor, to manage [its] internal operation[s] . . . .'" *United States v. Kokinda*, 497 U.S. 720, 725 (1990) (plurality opinion) (quoting *Cafeteria & Restaurant Workers v. McElroy*, 367 U.S. 886, 896 (1961)). *See also Brentwood*, 127 S. Ct. at 2495 ("Just as the government's interest in running an effective workplace can in some circumstances outweigh employee speech rights . . . so too can an athletic league's interest in enforcing its rules sometimes warrant curtailing the speech of its voluntary participants."); *Waters v. Churchill*, 511 U.S. 661, 671 (1994) (plurality opinion) (The government has "a freer hand in regulating the speech of its employees than it has in regulating the speech of the public at large."); *Rust v. Sullivan*, 500 U.S. 173 (1991) (The government, when managing a voluntary program, can regulate conduct, including speech, that is germane to the purpose of the program.).

Similarly, there is a difference between the way a school relates to the student body at large, and to students who voluntarily "go out" for athletic teams.

This Court has specifically recognized the distinction between the role of a teacher and a coach. *Dambrot*, 55 F.3d at 1190. Restrictions that would be inappropriate for the student body at large may be appropriate in the context of voluntary athletic programs. The greater restrictions on student athletes are analogous to the greater restrictions on government employees; thus, legal principles from the government employment context are relevant to the instant case.

In *Connick*, the plaintiff, an assistant district attorney, was informed that she would be transferred to another section. The plaintiff opposed the transfer, and expressed her objections to her supervisor, Connick. When her objections failed to avert the transfer, she "prepared a questionnaire soliciting the views of her fellow staff members concerning office transfer policy, office morale, the need for a grievance committee, the level of confidence in supervisors, and whether employees felt pressure to work in political campaigns." *Connick*, 461 U.S. at 141. Connick terminated the plaintiff after learning of the questionnaire. The plaintiff subsequently brought suit, claiming that her First Amendment rights were violated.

The Supreme Court noted that:

> To presume that all matters which transpire within a government office are of public concern would mean that virtually every remark – and certainly every criticism directed at a public official – would plant the seed of a constitutional case. While as a matter of good

> judgment, public officials should be receptive to constructive criticism offered by their employees, the First Amendment does not require a public office to be run as a roundtable for employee complaints over internal office affairs.

Id. at 149. The Supreme Court also noted that:

> [The plaintiff] did not seek to inform the public that the District Attorney's Office was not discharging its governmental responsibilities in the investigation and prosecution of criminal cases. Nor did [the plaintiff] seek to bring to light actual or potential wrongdoing or breach of public trust on the part of Connick and others. Indeed, the questionnaire, if released to the public, would convey no information at all other than the fact that a single employee is upset with the status quo. While discipline and morale in the workplace are related to an agency's efficient performance of its duties, the focus of [the plaintiff's] questions is not to evaluate the performance of the office but rather to gather ammunition for another round of controversy with her superiors.

Id. at 148.

The Supreme Court did hold, however, that part of the questionnaire addressed a matter of public concern: whether employees were pressured to work on political campaigns. The Supreme Court then proceeded to analyze the effect the questionnaire had on the office, and held that:

> [I]t requires no unusual insight to conclude that the purpose, if not the likely result, of the questionnaire is to seek to precipitate a vote of no confidence in Connick and his supervisors. Thus, Question 10, which asked whether or not the Assistants had confidence in and relied on the word of five named supervisors, is a statement that carries the clear potential for undermining office relations.

Id. at 152. The Supreme Court further held that it was not necessary "for an employer to allow events to unfold to the extent that the disruption of the office and the destruction of working relationships is manifest before taking action." *Id.* Finally, the Supreme Court held that "[t]he limited First Amendment interest involved here does not require that Connick tolerate action which he reasonably believed would disrupt the office, undermine his authority, and destroy close working relationships. [The plaintiff's] discharge therefore did not offend the First Amendment." *Id.* at 154.

We find a segment of the *Connick* reasoning to be analogous to the instant case. Specifically, the Supreme Court considered it self-evident that the questionnaire had "the clear potential for undermining office relations." *Id.* at 152. Thus, Connick could reasonably believe that the questionnaire would "disrupt the office, undermine his authority, and destroy close working relationships." *Id.* at 154.[5]

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[5] We respectfully disagree with Judge Gilman's assertion that we are grafting a public-concern requirement onto *Tinker*. Our

We note that the challenge to Connick's authority was far more oblique than Plaintiffs' challenge to Euverard's authority. The purpose of the Connick questionnaire was to lay the groundwork for a no-confidence vote, but the questionnaire itself did not challenge Connick. In contrast, the petition in the instant case contained (in fact, entirely consisted of) a direct attack on Euverard, and was part of an outright attempt to have him fired. The Supreme Court recognized that employers are not constitutionally required to tolerate threats, even if indirect, to their authority. The Supreme Court found it axiomatic that such threats had "the clear potential for undermining office relations." *Id.* at 152.

If employers are not required to tolerate indirect threats, they are clearly not required to tolerate outright attempts to have them fired. High school football coaches, as well as government employers, have a need to maintain order and discipline. Requiring coaches to tolerate attacks on their authority would effectively strip them of their ability to lead. It would also do a great disservice to other players who wish to play on a team free from strife and disunity; a team cannot function as a unit with groups of players and the coach pulling in opposite directions.

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holding in no way rests on a determination of whether Plaintiffs' speech touched on a matter of public or private concern. *Tinker* cases must be evaluated in the context in which they occur, and for the reasons stated above students who participate in voluntary athletic programs bear some similarities to government employees. We cite to *Connick* for the proposition that it is reasonable to forecast that disruption will occur when a subordinate challenges the authority of his or her superior.

The key to understanding *Connick* and the instant case is that neither case is fundamentally about the right to express one's opinion, but rather the ability of the government to set restrictions on voluntary programs it administers. The distinction is subtle, but important. The First Amendment prevents the state from using its coercive power to prevent people from expressing their opinions. However, managers of government programs necessarily exercise a degree of control over those programs, and the First Amendment does not guarantee that there will be no losers in intraoffice politics. The plaintiff in *Connick* engaged in intra-office politicking to reverse a management decision she disagreed with. Her efforts were unsuccessful, and she was terminated. The plaintiff had a right to criticize her supervisor; the state could not throw her in jail or deport her for her actions. However, the plaintiff did not have a right to continue working for the supervisor whose authority she challenged.

Likewise, Plaintiffs had, and have, a right to express their opinions about Euverard. Plaintiffs engaged in the equivalent of intra-office politicking to have Euverard fired. The message that Plaintiffs intended to deliver to the administration was essentially "either he goes or we go." This is not an uncommon situation in sports; owners sometimes have to choose between the players and the coach.[6] Unfortunately for Plaintiffs, the administration backed Euverard. Plaintiffs, in a sense, got what they desired:

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[6] *See* Mike Preston, *Billick's Message Has Grown Stale, so Ravens Need a Fresh Approach*, BALTIMORE SUN, Dec. 5, 2005, at E3.

they are no longer playing for a coach they admittedly did not want to play for.

Of course, the school could not, and did not, suspend them for their opinions. Plaintiffs' ability to attend class has not been threatened. As this Court has noted, "[t]he main purpose of high school is to learn science, the liberal arts and vocational studies, not to play football and basketball." *Crocker*, 980 F.2d at 387. Part of the Eighth Circuit's reasoning in *Wildman* is also particularly relevant to this situation: "The school did not interfere with Wildman's regular education. A difference exists between being in the classroom, which was not affected here, and playing on athletic team when the requirement is that the player only apologize to her teammates and her coach for circulating an insubordinate letter." *Wildman*, 249 F.3d at 772.[7] Plaintiffs' regular education has not been impeded, and, significantly, *they are free to continue their campaign to have Euverard fired.* What they are *not* free to do is continue to play football for him while actively working to undermine his authority.

Confusing the right to express one's opinion with the right to participate in a voluntary government program on one's own terms would lead to an unworkable legal regime. For example, suppose an applicant for a government job told the interviewer that he hated her and did not want to work for her, and was subsequently not hired for the position based

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[7] The Court notes that Jefferson County football players who signed the petition but apologized to Euverard and told him they wanted to play for him were allowed to remain on the team.

on his attitude. If the issue is framed as solely dealing with the applicant's right to express his opinion, he would be able to successfully bring a claim for viewpoint discrimination. That would be an absurd result, and fortunately the First Amendment does not require it. Likewise, if a group of students tried out for a football team and some students told the coach that they hated him and did not want to play for him, while others said that they respected him and wanted to play for him, the coach could select the players with positive attitudes without violating the First Amendment.

As the Supreme Court has noted, the First Amendment does not require a public office to be run as a roundtable for employee complaints over internal office affairs. *Connick*, 461 U.S. at 149. Nor does it require high school football teams to be run in that fashion. When players voluntarily "go out" for a team they implicitly agree to accept the coach's authority. When the government manages a voluntary program it may restrict conduct, including speech, that threatens the purpose of the program.

Of course, players do not completely waive their rights when they join a team: a coach could not dismiss a player simply because the player had religious or political views that were unpopular with his teammates. Nothing of the sort happened in the instant case. Nor was this a whistleblower situation, where players were disciplined for reporting improprieties. Plaintiffs participated in a petition stating "I hate Coach Euvard [sic], and I don't want to play for him," with the avowed intention of having Euverard fired. A consistent theme running

throughout *Tinker* and its progeny is that the First Amendment rights of students are more limited than those of adults. Clearly, the Supreme Court would reject out of hand the argument that a government employee has a First Amendment right to attempt to have his or her employer fired. It would make little sense, legal or otherwise, to confer an analogous right upon high school student athletes.

It was reasonable for Defendants to forecast that Plaintiffs' petition would undermine Euverard's authority and sow disunity on the football team. Thus, there was no constitutional violation in Plaintiffs' dismissal from the team. *Tinker* does not require teachers to surrender control of the classroom to students, and it does not require coaches to surrender control of the team to players.

III. CONCLUSION

For the above reasons, we **REVERSE** the district court's denial of summary judgment and remand the case for entry of summary judgment in favor of Defendants.

CONCURRING IN THE JUDGMENT

RONALD LEE GILMAN, Circuit Judge, concurring in the judgment. Contrary to the analysis in the lead opinion, I believe that the writing in question constitutes protected speech under *Tinker* and that the defendants have failed to carry their burden of "demonstrat[ing] any facts which might reasonably have led school authorities to forecast substantial disruption of or material interference with school

activities." *See Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 514 (1969) ("In order for the State in the person of school officials to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint."). The student-athletes in the present case, in my opinion, have thus properly asserted a constitutional violation.

But what I find most troubling about the lead opinion's analysis is that it significantly alters First Amendment jurisprudence by grafting the public-concern requirement of *Connick v. Myers*, 461 U.S. 138 (1983), onto the *Tinker* test, an approach never before taken in student-speech cases by either the Supreme Court or any other federal court of appeals to consider the issue. Moreover, the Supreme Court recently had an opportunity to overrule or otherwise alter *Tinker*, but explicitly declined to do so in a way that would affect the outcome of the present case. *See Morse v. Frederick*, 127 S. Ct. 2618, 2622 (2007) (holding that "a [high school] principal may, consistent with the First Amendment, restrict student speech at a school event, when that speech is reasonably viewed as promoting illegal drug use"). I nonetheless concur in the judgment because I believe that the First Amendment right as applied to the particular circumstances in this case was not so clearly established at the time of the alleged violation as to deprive the defendants of qualified immunity.

I. The lead opinion's application of *Connick* in a student-speech case is unprecedented

Although the lead opinion purports to apply *Tinker*, what it actually applies is the public concern test announced by the Supreme Court in *Connick*. The Ninth Circuit rejected this very approach in *Pinard v. Clatskanie School District 6J*, 467 F.3d 755 (9th Cir. 2006), and I do not think that we should consider it here. *See Pinard*, 467 F.3d at 766 ("Although *Connick*'s personal matter/public concern distinction is the appropriate mechanism for determining the parameters of a public employer's need to regulate the workplace, neither we, the Supreme Court nor any other federal court of appeals has held such a distinction applicable in student speech cases, and we decline to do so here."). I see no justification for grafting this requirement onto *Tinker* in the absence of Supreme Court caselaw instructing us to do so. *Tinker* has been in force for several decades now, and the Supreme Court's recent holding in *Morse* does nothing to undercut its application to the facts of the present case.

The lead opinion states that "[t]he key to understanding *Connick* and the instant case is that neither case is fundamentally about the right to express one's opinion, but rather the ability of the government to set restrictions on voluntary programs it administers." Lead Op. at 14. It goes on to state that "the First Amendment does not guarantee that there will be no losers in intra-office politics." *Id.* That may be true as a general proposition, but the fact remains that government employees and high school athletes are not similarly situated, despite the lead

opinion's analysis to the contrary. Whether we think that "student athletes have greater similarities to government employees than the general student body," Lead Op. at 12, is not determinative. What *is* determinative is that they are not similarly situated under existing caselaw. Furthermore, the Supreme Court has specifically given us one test for students and another test for public employees.

Applying *Connick* to the present case seems especially inappropriate given the Supreme Court's recent decision in *Morse*. In *Morse*, a high school senior unfurled a banner bearing the phrase "BONG HiTS 4 JESUS" across the street from his school while watching the Olympic Torch Relay pass through town. *Morse*, 127 S. Ct. at 2622. The viewing of the relay was a school sanctioned event. *Id.* Because the principal thought that the banner promoted illegal drug use, she asked the student to take it down, but the student refused. *Id.* The student was suspended as a result, and he subsequently sued the school, alleging that the school had violated his First Amendment rights. *Id.* at 2623.

Morse gave the Supreme Court an opportunity to revisit *Tinker* and, had Justice Thomas's view carried the day, to overrule it. *See Morse*, 127 S. Ct. at 2630 (Thomas, J., concurring) (writing separately to state his "view that the standard set forth in [*Tinker*] is without basis in the Constitution"). But the majority did not go that far, confirming only that "the rule of *Tinker* is not the only basis for restricting student speech." *Id.* at 2627. The Court's holding was a narrow one—namely, that "a principal may, consistent with the First Amendment, restrict student speech at

a school event, when that speech is reasonably viewed as promoting illegal drug use." *Id.* at 2622. And in reaching this holding, the Court emphasized the "important—indeed, perhaps compelling" interest in deterring drug use among schoolchildren. *Id.* at 2628.

Given the facts of *Morse*, the Supreme Court could well have chosen to add a public-concern requirement to the traditional *Tinker* analysis, but it did not do so. The school superintendent's administrative decision in *Morse* highlighted the fact that the student's speech was not political or espousing a religious viewpoint, but instead was "a fairly silly message promoting illegal drug usage in the midst of a school activity." *Id.* at 2623. But the Court did not depend on this fact in its analysis. Nor did it undercut the force of *Tinker* in a way that has application to the facts of the present case. Justice Alito's concurrence suggests just the opposite. *See id.* at 2638 (Alito, J., concurring) (writing separately to emphasize the special dangers of illegal drug use as grounds for greater regulation of student speech, but joining the majority opinion only "with the understanding that the opinion does not endorse any further extension" of speech restrictions in public schools).

Vague notions of "teamwork" and "unity" are simply not compelling school interests in the way that the prevention of illegal drug use is. Nothing in *Morse* suggests that anything other than a standard *Tinker* analysis is appropriate in the present case, and Justice Alito's concurrence explicitly suggests otherwise. *See id.* ("But I do not read the opinion to mean that there are necessarily any grounds for such regulation that are not already recognized in the holdings of this

Court."). I therefore would not alter First Amendment jurisprudence in the way that the lead opinion does.

II. The school has not met its burden under *Tinker*

To be sure, students do not have a general constitutional right to participate in extracurricular activities. Lead Op. at 5. But that is not the issue here. Neither is whether "conflict between a player and the coach can shake 'the very foundation of team chemistry,'" Lead Op. at 11, nor whether "coaches are entitled to respect from their players," Lead Op. at 10. Although both of these statements might well be true, neither presents a legal question. The issue in the present case is whether, under *Tinker*, the students' petition was protected speech. If it was, then the coach would have been within his rights to kick them off the team if, and only if, the school had "demonstrate[d] any facts which might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities." *Tinker*, 393 U.S. at 514; *Pinard*, 467 F.3d at 768 (stating that, under *Tinker*, "the defendants must justify their decision to suspend the players permanently" by showing such facts).

The lead opinion is undeniably correct in stating that the school is not required to wait for an actual disruption before acting, nor must the school be certain that a disruption would occur. Lead Op. at 9. It gives lip service to the correct standard under *Tinker*—that the forecast of substantial disruption be reasonable—but then fails to apply the standard correctly. Instead, it improperly places the burden on

the students to prove that there would not have been a disruption. This is simply not the test articulated in *Tinker*. The school bears the burden of demonstrating sufficient facts to support its forecast of substantial disruption. *See id.* at 514. It has not done so here.

Nor do I see in the record any claim by the defendants that the petition was disruptive in and of itself. What the record *does* contain is one player's opinion that "a situation where players said they hated the coach and didn't want to play for him would have a substantially negative effect on a football team," and an assistant coach who testified that, in his opinion, "a group of players saying they hated the coach could definitely break apart a team." Lead Op. at 9. At most, the defendants have asserted a generalized fear of disruption to team unity based on the students' critical opinion of Euverard's ability as a coach. This is simply not enough to meet the "substantial disruption" standard of *Tinker*. *See Tinker*, 393 U.S. at 511 ("[S]chool officials cannot suppress expressions of feelings with which they do not wish to contend.") (quotation marks omitted); *Seamons v. Snow*, 206 F.3d 1021, 1030 (10th Cir. 2000) ("[C]oaches may not penalize players for engaging in peaceful speech activity which does not create substantial disorder, materially disrupt class work, or invade the rights of others.").

Moreover, a review of the record shows that there was no possibility of disruption or interference, nor did the players intend that there be one, until Euverard found out about the petition, became upset, and decided to "smoke out" the culprits and dismiss them from the team. There are no facts in the record

suggesting that any disruption could have been reasonably forecast. The plaintiffs had no intention of quitting the team and were not otherwise "problem" players. Euverard did not even find out about the petition until one of the other players, who is not a party in this case, informed one of the assistant coaches.

III. The Ninth Circuit's analysis in *Pinard* is persuasive

In my view, the facts of the present case are closer to those in *Pinard v. Clatskanie School District 6J*, 467 F.3d 755 (9th Cir. 2006), than to those in *Wildman ex rel. Wildman v. Marshalltown School District*, 249 F.3d 768 (8th Cir. 2001), the latter case being the one relied upon by the lead opinion. Moreover, I believe that *Pinard* persuasively explains why the lead opinion's reliance on *Connick* is misplaced.

The lead opinion argues that the "crucial distinction" distinguishing *Pinard* from the present case is that "the coach in *Pinard* voluntarily put his authority into play, so to speak" by telling the players that if they wanted him to quit, that he would do so. Lead Op. at 8. I disagree that *Pinard* can be so easily distinguished on this basis. The Ninth Circuit certainly did not rely on this point in concluding that the petition was protected under the First Amendment. *Pinard*, 467 F.3d at 76869. As in the present case, the *Pinard* plaintiffs alleged that the coach had engaged in abusive and intimidating behavior toward the players. *Id.* at 760. The players, after a team meeting where the coach "told the players that if they wanted him to quit, they should say so,

and he would resign," signed a typewritten petition asking the coach to resign. *Id.* All players but one (the coach's son) signed the petition. *Id.* at 761.

Arguably the petition in *Pinard* exhibited even greater insubordination than the one in the present case, because the cocaptains of the team in that case presented the petition directly to the coach himself in the middle of the season. *Id.* at 761. In contrast, Lowery and the other students here had no intention of presenting the petition until after the football season had ended. Nor did any of the students themselves actually present the petition to any teacher or coach. For purposes of summary judgment, we must consider these facts in the light most favorable to Lowery and his fellow plaintiffs. *See Spirit Airlines, Inc. v. Nw. Airlines, Inc.*, 431 F.3d 917, 930 (6th Cir. 2005) (noting, in reviewing a district court's grant of summary judgment, that "[w]e must also consider all facts in the light most favorable to the non-movant and must give the non-movant the benefit of every reasonable inference") (quotation marks omitted).

I further disagree with the lead opinion's reliance on *Wildman*. The *Wildman* court cited the governing standard both from *Tinker* and from *Bethel School District No. 403 v. Fraser*, 478 U.S. 675 (1986), the latter governing vulgar, lewd, obscene, or plainly offensive speech. A review of the *Wildman* opinion does not reveal which standard the Eighth Circuit used in its analysis. What it does reveal is that the court there focused on the alleged insubordinate nature of the speech, coupled with the conclusory statement that "coaches deserve a modicum of respect from athletes, particularly in an academic setting."

Wildman, 249 F.3d at 772. It also implied that had Wildman's speech been on a more important topic, that it may have been protected under either framework. *See id.* ("Here, in an athletic context [de]void of the egregious conduct which spurred the football player's speech about the hazing incident in *Seamons* [*v. Snow*, 206 F.3d 1021 (10th Cir. 2000)], and where Wildman's speech called for an apology, no basis exists for a claim of a violation of free speech.").

The problem with the Eighth Circuit's analysis as applied to the present case is that it improperly makes a value judgment on the speech itself, something that is not part of the *Tinker* analysis. As the plaintiffs here correctly point out, viewpoint discrimination is simply not tolerated under *Tinker*. But this is precisely the effect of the lead opinion's statement that "a coach could not dismiss a player simply because the player had religious or political views that were unpopular with teammates." Lead Op. at 30. In a pure speech case such as the present one, such a value judgment is inappropriate in the absence of extenuating circumstances, such as a school's commitment to combating illegal drug use. *See Tinker*, 393 U.S. at 505-06 (noting that the Supreme Court has repeatedly held that "pure speech . . . is entitled to comprehensive protection under the First Amendment") (quotation marks omitted); *Morse*, 2007 WL 1804317, at *11 (holding that the "First Amendment does not require schools to tolerate at school events student expression" that could be reasonably construed as promoting illegal drug use, but emphasizing the holding as inextricably entwined with the school's policy against drug use).

There is no disputing the fact that "student athletes are subject to more restrictions than the student body at large." Lead Op. at 5 (citing *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646 (1995)). And "[b]y choosing to 'go out for the team,' [student-athletes] voluntarily subject themselves to a degree of regulation even higher than that imposed on students generally." *Id.* at 657. At the same time, however, a student-athlete does not, as suggested by the lead opinion, enjoy fewer First Amendment rights under *Tinker* because of his or her choice to participate in high school athletics. Lead Op. at 5-6. The examples given by the Court in *Vernonia* of increased regulation over student athletes—submitting to a preseason physical exam, acquiring adequate insurance coverage, signing an insurance waiver, maintaining a minimum grade point average, and complying with rules of conduct, dress, or training hours, *Vernonia*, 515 U.S. at 567—do not support a similar restriction on free-speech rights.

In sum, we need look no further than the now-famous language from *Tinker* to guide the analysis in this case:

> A student's rights, therefore, do not embrace merely the classroom hours. When he is in the cafeteria, *or on the playing field*, or on the campus during the authorized hours, he may express his opinions, even on controversial subjects like the conflict in Vietnam, if he does so without materially and substantially interfering with the requirements of appropriate discipline in the operation of the school . . . .

Tinker, 393 U.S. at 512-13 (emphasis added) (parentheses and quotation marks omitted). The football players in this case expressed their opinion about their coach by signing a petition. At least half of the team signed it. Nothing else happened until Euverard found out, became upset, and retaliated against the instigators who dared to question his abilities as a coach. For the reasons explained above, I think that this case bears remarkable similarity to *Pinard* and that there was a violation of the student-athletes' First Amendment rights under *Tinker*.

IV. Qualified immunity

A finding of a constitutional violation, however, is but the first step in the qualified immunity analysis. As the lead opinion explains, that right must also be clearly established at the time of the violation. Lead Op. at 3. "A right is 'clearly established' for qualified immunity purposes when the contours of the right are sufficiently clear, even if the specific action in question has never been held unlawful." *Smoak v. Hall*, 460 F.3d 768, 778 (6th Cir. 2006). Preexisting law need not, however, "address the very question at hand." *Logsdon v. Hains*, — F.3d —, 2007 WL 1946851, at *6 (6th Cir. July 6, 2007). The relevant inquiry in this case is whether Euverard should have clearly realized "that his conduct was unlawful in the situation he confronted." *See Smoak*, 460 F.3d at 768.

Tinker, of course, has been the law since 1969, protecting the general right of students to exercise free speech while in school. There is no caselaw in this circuit, however, applying *Tinker* to student-athletes

and defining the contours of their First Amendment rights. For this reason, I do not believe that the contours of the right were sufficiently clear to put Euverard on notice that his action in response to the petition was a violation of the First Amendment. *See Seal v. Morgan*, 229 F.3d 567, 581 (6th Cir. 2000) (holding that a school superintendent was entitled to qualified immunity where the contours of the constitutional right were not "sufficiently clear to put a reasonable school superintendent on notice in 1996 that a school disciplinary policy's lack of a conscious-possession[-of-a-weapon] requirement could produce irrational expulsions and thus violate the legal rights of students expelled under the policy").

The plaintiffs, moreover, have presented nothing to overcome their burden of showing that Euverard should be denied qualified immunity. *See Smoak*, 460 F.3d at 778 ("Throughout the analysis, the burden is on the [plaintiffs] to show that the defendants are not entitled to qualified immunity."). I therefore concur in the judgment, despite what I believe is the lead opinion's erroneous refusal to recognize the constitutional right at issue.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
AT KNOXVILLE

No. 3:05-CV-560 (Phillips)

[Filed August 22, 2006]

DERRICK ("RABBIT") LOWERY, et al.,	)
	)
Plaintiffs,	)
	)
v.	)
	)
MARTY EUVERARD, et al.,	)
	)
Defendants.	)
	)

ORDER

This matter came before the court for a motion hearing on August 17 and 18, 2006. Following the parties' presentation of evidence and oral argument, the following action was taken, the court having ruled from the bench:

1. Plaintiffs' motion for preliminary injunction [Doc. 41] is **DENIED.**

2. Plaintiffs' motion for partial summary judgment [Doc. 39] is **GRANTED.**

3. Plaintiffs' motion to compel and for sanctions [Doc. 47] is **DENIED AS MOOT.**

4. Defendants' motion to dismiss or for summary judgment [Doc. 55] is **DENIED**.

5. Defendants' motion to stay further discovery pending the court's ruling on qualified immunity [Doc. 60] is **DENIED AS MOOT.**

6. Plaintiffs' motion for extension of time to respond to defendants' motion for summary judgment [Doc. 66] is **DENIED AS MOOT**.

IT IS SO ORDERED.

ENTER:

s/ Thomas W. Phillips
United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 06-6172

[Filed February 1, 2008]

JEFF LOWERY, ET AL.,	)
	)
Plaintiffs-Appellees,	)
	)
v.	)
	)
MARTY EUVERARD, ET AL.,	)
	)
Defendants-Appellants.	)
	)

ORDER

BEFORE: SILER and GILMAN, Circuit Judges; and ZATKOFF,* District Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other

* Hon. Lawrence P. Zatkoff, Senior United States District Judge for the Eastern District of Michigan, sitting by designation.

active judges of this court, and less than a majority of the judges having favored the suggestion, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/_____
Leonard Green, Clerk

APPENDIX D

THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE AT KNOXVILLE, TENNESSEE

NO. 3:05-CV-560

[Dated August 18, 2006]

JEFF LOWERY, ET AL.,	)
	)
PLAINTIFFS,	)
	)
VS.	)
	)
MARTY EUVERARD, ET AL.,	)
	)
DEFENDANTS.	)
	)

MOTION FOR PRELIMINARY INJUNCTION - VOLUME TWO OF TWO

Transcript of Proceedings before the Honorable Thomas W. Phillips, U.S. District Judge, on August 18th, 2006.

APPEARANCES:

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[p. 2]

INDEX

Recesses: 53, 133, 241

Defendants' Motion to Deny
Preliminary Injunction Motion: 154

Defense Rests Case-in-Chief: 240

Plaintiffs Rests Entire Case: 240

Closing Argument:

By Mr. Kelley 241

By Mr. Duffy 249

Court Grants Plaintiffs' Motion for Partial Summary Judgment: 242

Court's Ruling on Motions: 256

Court Denies Defendants' Motion to Later Renew Motion for Qualified Immunity: 262

Plaintiffs' Witnesses:	Direct	Cross	Redirect	Recross
John D. Brimer	3	45	67	
Derek Lowery	74	88		
Joseph Dooley	96	110	113	
Brett Dinton	115	121	128	
Randy Giles	134	145	147	
Lisa A. Lowery	150	152		

Plaintiffs' Exhibits:		Identified	Received
P-1	Petition with Signatures	99, 116	
P-2	Coach Brimer's Notes of Player Interviews	29	29, 73

[p. 256]

If you read the state statute on the director of school, you will see that he decides where everybody goes.

THE COURT: Thank you, Mr. Duffy.

MR. DUFFY: And unless illegal motive was shown on his part, there'd be 101 liability (phonetic). Thank you, Your Honor.

THE COURT: Thank you, Mr. Duffy.

There are three categories of speech that school officials may constitutionally regulate, each of which is governed by different Supreme Court decisions. First of all, vulgar, lewd, obscene and plainly offensive speech is governed by *Bethel School District vs. Fraser*, decision of the Supreme Court in 1986 school-sponsored speech is governed by *Hazelwood School District vs. Kuhlmeier*, a decision by the Supreme Court in 1988.

Neither or those two cases define the situation that we have in the case before the bar. I'm not talking

about vulgar, lewd or obscene or offensive speech, and we're not talking about school-sponsored speech.

Speech that falls into neither of these categories is governed by *Tinker vs. Desmoine Independent Community School District*, a decision by the United States Supreme Court in 1969. Because the plaintiffs' speech falls within *Tinker's* third category of "all other speech," the defendants must justify their decision to suspend the players permanently by showing facts which might reasonably have led them to forecast substantial disruption of or material interference with school activities. I'm reading from

[p. 257]

The *Tinker* decision.

Now, what that simply means is, we do have protected speech in this instance, but even if it is protected speech, the school board can still regulate that speech if, in fact, it does or could have reasonably led to school officials to forecast substantial disruption of or material interference with school activities.

The United States Supreme Court has also ruled that the responsibility or running a school system contains within it the inherent authority to prescribe and control conduct of students within the school systems. This determination of what manner of speech in schools is inappropriate, the Supreme Court ruled, properly rests with the school boards rather than the federal courts. However, our deference to school boards or school officials in regulating student speech does not

diminish our duty to insure they do not infringe students' First Amendment rights under *Tinker*.

We have two issues in this case. The first issue is whether there are facts which might reasonably have led the school officials to forecast substantial disruption of or material interference with school activities. We've got testimony from the school officials, from the coaches, saying that, yes, it certainly did disrupt the athletic program at Jefferson County High School.

We also have the testimony of Brett Denton, Co-Captain of the team, who testified, yes, it did cause problems on the football team, did cause problems with the football program. We also have

[p. 258]

the testimony of the students, who testified that they played 100 percent – practiced 100 percent, that it did not interfere with their dedication to the school football program and that they would not allow it to so interfere.

That's a jury question, that's a question of fact. The jury's going to have to determine who's telling the truth and who's not telling the truth or which set of facts the jury wishes to find in favor of one side or the other.

There's another issue in this case, and that issue is whether these students where – assuming that the plaintiffs get over the first hurdle of demonstrating that the protected speech did not lead the school

officials to forecast substantial disruption of or material interference with a school football program – plaintiffs have also got to demonstrate by a preponderance of the evidence at trial that they were dismissed for signing the petition, not because of the disruption.

In a retaliation claim, under the First Amendment, the plaintiffs must establish that: they engaged in constitutionally protected activity; I think the evidence clearly establishes that defendants' actions would chill a person of ordinary firmness from continuing to engage in the protected activity, I guess that's open to question and will be determined by the jury and that the protected activity was a substantial or motivating factor in the defendants' conduct; in other words, were the students kicked off the football team because they signed the petition or were they

[p. 259]

kicked off the football team because their insubordination caused substantial disruption of or material interference with the school athletic program.

Therefore, since we do have these issues of fact, I think quite clearly defendants' motion to dismiss or, in the alternative, for summary judgment prior to depositions is unwarranted and will be denied.

The issue of whether or not the defendants are entitled to qualified immunity will also be denied. These school officials are highly qualified, they're highly educated. They either know or should know of the Supreme Court precedents regulating student

speech; and if they, knowing that information, violated the Supreme Court precedents, they should not be immune from liability therefore, the Defendants' Motion for Qualified Immunity will be denied.

Now, turning now to the standard for a preliminary injunction. Three factors that the plaintiff must prove in order to establish entitlement to a preliminary injunction, which is a very severe remedy.

First of all, the likelihood that the plaintiffs would succeed on the merits; secondly, whether the plaintiffs will suffer irreparable harm; third, whether granting the injunction will cause substantial harm to defendants; fourth, whether the public interest is advanced by ordering the relief sought.

Taking these in reverse order, whether the public interest is

[p. 260]

advanced by ordering the relief sought, I can't really say that it will. I do not believe that the plaintiffs have demonstrated that there is a tremendous public interest which will be served by issuing a preliminary injunction in this case.

The next factor, whether granting the injunction will cause substantial harm to defendants, I think that it will cause substantial harm to the defendants inasmuch as we have the testimony of the co-captain of the football team who says that it will cause problems for these individuals to be placed back on the team.

And we also have the testimony of the plaintiffs that they would not cause problems, but at this point the Court has got to decide whether or not granting the injunction will cause substantial harm to the defendants, and it appears to the Court at this juncture in the proceedings that it will.

Whether the plaintiffs will suffer irreparable harm. Well, there's --unquestionably, the plaintiffs will suffer harm. I played high school football, wasn't very good, but I managed to play a little bit. I know what it's like not to be able to play, particularly in your senior year. But it's not irreparable harm; therefore, I don't believe that that factor can be decided in favor of the plaintiffs.

And, last of all, and this is the reason why I cannot grant a preliminary injunction in this case, the likelihood that the plaintiffs will succeed on the merits. This is a close case I mean, it

[p. 261]

will have to be evaluated and balanced by the members of the jury, because there are questions of fact.

I cannot find that there is a likelihood that the plaintiffs will succeed. Plaintiffs may succeed, defendants may succeed. Under those circumstances and under the standard that I am required to follow in considering the issuance of a preliminary injunction under rule 65, I cannot do that. Therefore, the motion for a preliminary injunction will be denied.

Now, there's also a motion for extension of time to respond to the defendants' motion for summary judgment. That's denied as moot inasmuch as I've just ruled on it.

Okay. We need a trial date. We have heard every bit of the evidence. I don't know what else you could possibly present. I don't know what other testimony you would need to prepare. I would suggest that we get a trial date and try this within a reasonably short period of time.

MR. DUFFY: Your Honor, could I make a couple of inquiries for clarification?

THE COURT: You may.

MR. DUFFY: The Amended Complaint did add the Board of Education as a Defendant.

MR. KELLEY: Your Honor, we are months after the time for them to have answered. They didn't file a motion for default because it seemed that was not productive previously when they missed it. But they've never, the School Board, has never answered

[p. 262]

after probably three months late.

MR. DUFFY: We filed a Motion to Dismiss or, in the alternative, for Summary Judgment. But that has now been denied, so –

THE COURT: I'm sorry. What is the issue?

MR. KELLEY: I'm sorry, Your Honor. They didn't timely file any responsive pleading. But you're saying you did file the Motion to Dismiss on behalf of the Board? I don't think there was anything filed on behalf of the Board, Mr. Duffy.

MR. DUFFY: Well, the letter was supposed to be on behalf of all defendants, because it was supposed to cover – remember, we extended it so it would cover the Amendment Complaint.

MR. KELLEY: I'm sorry, Your Honor. I interrupted. We don't have an answer on behalf of the Board.

MR. DUFFY: Right. There has been no ruling on the issue of the entity liability, but the Court will take that under advisement. My second questions is, we now have taken depositions of the parties, and as I indicated in the introduction yesterday, what I would request to do – and I did not know, you know, what the plaintiffs' position would be on that – is when we get the clean transcripts, we've only got the draft ones now, that defendants be allowed to submit the excerpts of the depositions. And in order to be spared the burdens of trial, renew the motion for qualified immunity based on the depositions.

THE COURT: Denied. We're not going to try this case

[p. 263]

forever, Mr. Duffy.

MR. DUFFY: All right.

THE COURT: Much to much time and effort and money has already been wasted on it. Got anything else?

MR. DUFFY: Can we tender those depositions for the record?

THE COURT: Yes, you can tender them for the record. You want to go to the Sixth Circuit Court of Appeals, Mr. Duffy, you know the way to Cincinnati, be my guest. But we have wasted too much time with this case already. You got anything else?

MR. DUFFY: No, Your Honor.

THE COURT: All right. I shouldn't say that we've wasted too much time. I don't mean that. I mean that I really feel for these parties, and I'm not at all certain that the lawyers have acted in the best interests of the community and the people in Jefferson County. I hope you have, but it looks to me like you've gotten yourselves into a litigation that's just torn the community apart. I don't think you've done very much to help it, and I'm disappointed because of that.

All right. Let's get a trial date. Do you want to get something after the first of the year?

MR. KELLEY: As soon as possible, Your Honor. We're in the middle of the season.

MR. DUFFY: I don't have a calendar with me.

THE COURT: Mr. Krieg?

[p. 264]

MR. KRIEG: Your Honor, it's no excuse, but we've just gotten into this case as of Monday this week.

THE COURT: I understand that, Mr. Krieg.

MR. KRIEG: I was not on any – I didn't have any idea that there was going to be a trial date set today. Is there any possibility we can do this the first of the week or something rather than today? I know what's going to happen when I go back to the office and have a conflict.

MR. KELLY: Your Honor, I know the Court's heard this before, delay is debt.

MR. KRIEG: I'm not asking for a delay.

MR. KELLY: Your Honor, I'd like us to set it right now this fall so, if we win, at least we can – they can possibly salvage some of these games.

MR. KRIEG: Set it right now, and if I have a conflict, I'll immediately bring it to the court's attention.

THE COURT: Well, since we've heard all the testimony, would it take more than a couple of days to try it?

MR. KELLY: I Don't believe so, Your Honor.

THE COURT: Well, it took two days this time.

MR. KRIEG: We only got about 45 minutes worth of proof, Your Honor. We may have more in a jury trial.

MR. DUFFY: A lot, a lot more witnesses and testimony, but that we chose not to offer at the preliminary injunction stage.

[p. 265]

MR. KELLY: Your Honor, one of the crucial –

THE COURT: Mr. Kelley had the burden. I'm sorry, Mr. Kelley.

MR. KELLEY: Your Honor, one of the crucial things is whether the defendants are going to waive jury trial. Because, if they are, none of this testimony will have to be repeated presumably, all that would – all that have to be done would be some supplements. I mean, that's a crucial thing. If they're going to demand a jury trial, then that certainly changes the circumstances, although I certainly hope it wouldn't cause the Court to delay it outside the season.

THE COURT: Okay. Let me do this. It's late in the afternoon, you don't have your calendars, everyone's worn out I'm sure everybody would like to go home and relax and forget about this for a while. Call my Senior Law Clerk Monday. She will set you a trial date. Okay? Or should we have Ms. Jackson do that? Who sets the trial dates?

LAW CLERK: Well, you.

(LAUGHTER)

LAW CLERK: But Janet has our calendar.

THE COURT: The truth comes out. Okay. Call Ms. Jackson, she'll give you a trial date. Anything further we need to take up, Counsel?

MR. KRIEG: No, Your Honor.

MR. KELLEY: No, Your Honor.

[p. 266]

THE COURT: We'll stand in recess – we'll stand adjourned.

(Hearing Concluded at 4:47 p.m.)

CERTIFICATION

I certify that the foregoing is an accurate transcript of the Record of Proceedings in the titled matter.

/s/ _____ 9/18/06

Donnetta Kocuba
Official Court Reporter
U.S. District Court
Knoxville, Tennessee

Date

APPENDIX E

In the
UNITED STATES COURT OF APPEALS
for the Sixth Circuit

CASE NO. 06-6172

[Filed August 17, 2007]

DERRICK ("RABBIT") LOWERY, a minor, et al., Plaintiffs/Appellees,	)
v.	)
MARTY EUVERARD, et al., Defendants/Appellants.	)

On Appeal from the United States District Court for the Eastern District of Tennessee, Northern Division (the Honorable Thomas W. Phillips)

PETITION FOR REHEARING *EN BANC* OF PLAINTIFFS/APPELLEES

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REQUIRED FRAP 35(b) STATEMENT FOR REHEARING EN BANC

We express a belief, based on a reasoned and studied professional judgment, that the panel decision (attached hereto as Appendix) is contrary to the following decisions of the United States Court of Appeals for the Sixth Circuit and the Supreme Court of the United States and, therefore, consideration by the full Court is necessary to secure and maintain uniformity of decisions:

Tinker v. Des Moines Independent School District, 393 U.S. 503, 89 S. Ct. 733, 21 L. Ed. 2d 731 (1969)

Castorina v. Madison County School Board, 246 F.3d 536 (6th Cir. 2001)

Thaddeus-X v. Blatter, 175 F.3d 378, 386 (6th Cir. 1998) *(en banc).*

We further express a belief, based on a reasoned and studied professional judgment, that this appeal involves one or more questions of exceptional importance concerning the First Amendment rights of students and that the panel decision conflicts with the following authoritative decisions of every other United States Court of Appeals that has addressed the issue

of whether student speech must touch upon matters of "public concern" as a prerequisite to First Amendment protection:

Pinard v. Clatskanie School District GJ, 467 F.3d 755 (9th Cir. 2006)

Garcia v. S.U.N.Y. Health Services Ctr. of Brooklyn, 280 F.3d 98 (2d Cir. 2001)

Seamons v. Snow, 206 F.3d 1021 (10th Cir. 2000).

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TABLE OF CONTENTS

PAGE

REQUIRED FRAP 35(b) STATEMENT FOR REHEARING EN BANC 1

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

INTRODUCTION 1

I. By Applying The "Public Concern" Test To This Student Speech Case, The Panel's Opinion Conflicts With *Tinker* And Every Other United States Court Of Appeals That Has Addressed This Issue ... 4

II. The Panel Severely Misapplied *Tinker* 7

III. The Panel's Decision Is Contrary To Decisions Of The Supreme Court And The Sixth Circuit On What Constitutes An Adverse Action 13

IV. This Appeal Involves Critical Principles Of Freedom Of Expression Under The First Amendment To The United States Constitution 15

Certificate of Service 16

Appendix - The Panel Opinion 17

TABLE OF AUTHORITIES

PAGE

CASES

Bell v. Blatter,
308 F.3d 594, 606 (6th Cir. 2002) 14

Bloch v. Ribar,
156 F.3d, 673, 681-82 (6th Cir. 1998) 13-14

Castorina v. Madison County School Board,
246 F.3d 536 (6th Cir. 2001) 4

Connick v. Myers,
461 U.S. 138, 103 S. Ct. 1684,
75 L. Ed. 2d 708 (1983) 4-6

D.B. v. Lafon,
2007 U.S. App. LEXIS 3886,
at **17-18 (Feb. 21, 2007) 9

Dean v. Byerley,
354 F.3d 540, 551 (6th Cir. 2004) 13

Estate of Carter v. City of Detroit,
408 F.3d 305, 311 (6th Cir. 2005) 3

Garcia v. S.U.N.Y. Health Services Ctr. Of Brooklyn,
280 F.3d 98 (2d Cir. 2001) . . . . . ii, 5

Morse v. Frederick,
127 S.Ct. 2618 (2007) 5-6, 10

Pagan v. Fruchey,
2007 U.S. App. LEXIS 15524
(6th Cir. June 29, 2007) 8, 11-12, 15

Pinard v. Clatskanie School District GJ,
467 F.3d 755 (9th Cir. 2006) ..... i, 5, 8

Rutan v. Republican Party of Illinois,
497 U.S. 62, 75 n. 8, 111 L. Ed. 2d 521,
110 S. Ct. 2729 (1990) 13-14

Saxe v. State College Area Sch. Dist.,
240 F.3d 200, 211 (3d Cir. 2001) 7

Seamons v. Snow,
206 F.3d 1021 (10th Cir. 2000) ..... ii, 4

Siggers-Dell v. Barlow,
412 F.3d 693, 701 (6th Cir. 2005) 14, 15

St. John v. Hickey,
411 F.3d 762, 769-70 (6th Cir. 2005) 10

Tennessee Secondary School Athletic Association v. Brentwood Academy,
127 S.Ct. 2489, 168 L.E.2d 166 (2007) 11

Thaddeus-X v. Blatter,
175 F.3d 378, 386 (6th Cir. 1998) *(en banc)* . i, 13-15

Tinker v. Des Moines Independent School District,
393 U.S. 503, 89 S. Ct. 733,
21 L. Ed. 2d 731 (1969) ..... i, 2-12, 15

West Virginia Bd. of Educ v. Barnette,
319 U.S. 624 (1943) 2

Wildman v. Marshalltown,
249 F.3d 768, 770 (8th Cir. 2001) 8

STATUTES

42 U.S.C. § 1983 ..... 13, 15

F.R.A.P. 35, *et seq* ..... i, 2-3

[p. 1]

Introduction

During the fall of 2005, eighteen high school students signed a petition that was critical of the head varsity football coach at Jefferson County High School ("JCHS"), Defendant/Appellant Marty Euverard ("Euverard"). The petition was based upon Euverard's repeated acts of abusive, humiliating, and inappropriate conduct toward their teammates.[1] The Student-Athletes who started the petition intended to circulate it among players and former players and give

---

[1] Euverard threw away and directed others to throw away college recruiting letters to disfavored players, according to the long-time athletic department secretary, Annie Watkins. Euverard also struck a player in the head and publicly humiliated players in front of their teammates (saying one "made him want to vomit"). The lead opinion describes such acts as mere "coaching methods." App., at *2. It is difficult to understand how the panel concluded that this was not "a whistleblower situation, where players were disciplined for reporting improprieties." App., at * 15.

it to the principal at the end of the season. The Student-Athletes hoped that, by having many signatures, the principal would understand the dissatisfaction with Euverard was widespread.

For three days, the petition was circulated without the knowledge of the coach and without any disruption in school operations. However, when Euverard learned of it, he became angry and initiated a plan to identify and punish the ring-leaders. *See* App., at *19 (Gilman, J., concurring in the judgment).[2] On the following Monday, Euverard replaced practice with individual player interrogations in which he asked who started the petition and whether each interrogee signed it. Through that process, he learned the names of the Student-Athletes. All were permanently dismissed from the team. The District Court found that there was a factual dispute regarding the basis for the dismissal.[3] The District Court granted Plaintiffs' Motion for Partial Summary Judgment, finding that the petition and the statements made in connection with the petition were protected under *Tinker v. Des*

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[2] "[A] review of the record shows that there was no possibility of disruption or interference, nor did the players intend that there be one, until Euverard found out about the petition, became upset, and decided to 'smoke out' the culprits and dismiss them from the team."

[3] The action of the Student-Athletes, which Defendants characterize as "insubordinate," was merely a refusal to be interrogated individually. That alone was Euverard's purported basis for permanent dismissal, even though other players who admittedly lied to him in the interrogations were permitted to stay on the team.

Moines Independent School District, 393 U.S. 503, 89 S. Ct. 733, 21 L. Ed. 2d 731 (1969).[4] The District Court denied Defendants' Motion for Summary Judgment, finding that the free speech rights of the Student-Athletes were clearly established.

Pursuant to F.R.A.P. 35, Plaintiffs file this Petition for Rehearing *En Banc* of the panel's August 3, 2007 decision. Basing its analysis on a patchwork of non-student speech cases, quotations of sportswriters, vague concepts such as "team unity," and the movie *Hoosiers,* the panel found that the speech was not protected.[5] In what is better described as a dissent, Judge Gillman concurred based upon qualified immunity.[6]

Despite the express statement in *Tinker* that students have free speech rights "on the playing field,"

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[4] The parties and the panel agree that the case is governed by *Tinker.*

[5] Curiously, the panel opinion completely fails to address one of the First Amendment rights at issue – the right of Dillon Spurlock (who signed the petition but was not involved in the "insubordination") to be free from compelled speech. *See West Virginia Bd. of Educ. v. Barnette,* 319 US. 624 (1943).

[6] The lead panel opinion only reached the threshold question of whether the facts, if true, establish a constitutional violation, which is the focus of this petition. *Estate of Carter v. City of Detroit,* 408 F.3d 305, 311 (6th Cir. 2005). Nevertheless, Plaintiffs are not abandoning their contention that the First Amendment rights at issue were clearly established, as the District Court found.

the opinion will have the unprecedented effect of establishing that the First Amendment rights of approximately 837,923[7] student-athletes in Tennessee, Kentucky, Ohio, and Michigan are more restricted than the rights of non-athletes. The breadth of the panel's opinion also invites lower courts to extend such reasoning to all students involved in extracurricular activities.

These issues are "of exceptional importance" and at odds with controlling precedent of this Court and the United States Supreme Court. Thus, *en banc* review is also necessary "to secure or maintain uniformity" of the Circuit's decisions. F.R.A.P. 35(a)(1).

I. By Applying The "Public Concern" Test To This Student Speech Case, The Panel's Opinion Conflicts With *Tinker* And Every Other United States Court Of Appeals That Has Addressed This Issue

In the now famous words of Justice Fortis, students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker*, 393 U.S. at 506. Based upon this fundamental principle, the Court established a standard that permits the regulation of students' speech *only if* there is a showing that engaging in the forbidden speech would "materially and substantially interfere with the requirements of appropriate discipline in the operation

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[7] National Federation of High Schools, Handbook 2006-07 48 (2006) (Because the cited figure reflects the participation rate, individuals who participated in two sports are counted twice, etc.).

of the school." *Tinker,* 393 U.S. at 509. In *Tinker*, the Supreme Court also made clear that the right to freely exchange opinions "even on controversial subjects" is not limited to classroom hours – it extends to areas such as "the cafeteria" and *"the playing field." Id.* at 512-13 (citations omitted) (emphasis added). *Tinker* has been followed in this Circuit and in other Circuits since 1969. *See, e.g., Castorina v. Madison County Sch. Bd.,* 246 F.3d 536 (6th Cir. 2001).

On its face, "the lead opinion purports to apply *Tinker,* [but] what it actually applies is the public-concern test announced by the Supreme Court" in *Connick v. Myers,* 461 US. 138, 103 S. Ct. 1684, 75 L. Ed. 2d 708 (1983). App., at *17 (Gilman, J., concurring in the judgment). Yet, the public concern test has been rejected by every United States Court of Appeals to have considered the test in a student speech case. *See Seamons v Snow*, 206 F.3d 1021, 1030, n. 4 (10th Cir. 2000) (reversing the district court's decision and criticizing the district court's "attempt[] to analogize the circumstances here to First Amendment cases involving public employees" in the face of "the well-established Supreme Court authority" on the standards applicable to student speech); *see also Pinard v. Clatskanie Sch. Distr. 6J,* 467 F.3d 755, 766 (9th Cir. 2006); *Garcia v S.U.N.Y. Health Services Ctr. of Brooklyn,* 280 F.3d 98 (2nd Cir. 2001).[8] Further, the

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[8] The most compelling evidence that the panel has added a "public concern" test is its own admission that the coach could not dismiss a player for expressing unpopular "religious or political views" or being dismissed for blowing the whistle on "improprieties." App.,

test is conspicuously absent from the leading decisions of the Supreme Court addressing student speech. *See Morse v. Frederick*, 127 S.Ct. 2618 (2007); *Tinker*, 393 U.S. 503. The panel's decision to pay lip service to *Tinker* and instead apply *Connick* results in this Court now being a unique outlier on the subject of student speech.

The panel erroneously based its opinion on the belief that high school athletes are similarly situated to government employees and, thus, any student-athlete expressing a negative opinion about his coach *ipso facto* causes disunity in the entire team. App., at **13-14. However, whether high school athletes are similarly situated to government employees is not determinative; rather, "[w]hat is determinative is that they are not similarly situated under existing" Supreme Court and Sixth Circuit precedent, which has outlined "one test for students and another test for public employees." App., at *17 (Gilman, J., concurring in the judgment). The Supreme Court could have easily added a public concern requirement to the traditional *Tinker* analysis in its *Morse* decision earlier this year and decided the case on that basis. App., at *18 (Gilman, J., concurring in the judgment) (citing *Morse*, 127 S.Ct. at 2623). Because the Supreme Court did not do so, the panel should have applied an unaltered *Tinker* analysis. *Id.*

In short, by allowing Defendants to punish the Student-Athletes for engaging in what the panel

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at p. 15. Implicit in this statement is the acknowledgment that speech in these areas would be protected.

characterizes as a losing battle of "intra-office politicking" similar to the "battle" in *Connick,* App., at *14, the panel has in fact grafted the "public concern" test onto *Tinker*.[9] Unless reversed, all student-athletes in this Circuit will be chilled from acting as whistleblowers relating to wrongdoing by a coach – sexual abuse, physical abuse, or harassment – lest they be dismissed from the team for doing so.[10]

II. The Panel Severely Misapplied *Tinker*

Even to the extent the panel actually applied *Tinker*, the panel erred by reversing the decision of the District Court, which held that there was a disputed issue of material fact concerning whether Defendants might reasonably have forecasted disruption.

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[9] *See* App., at *17 (Gilman, J., concurring in the judgment) ("[W]hat I find most troubling about the lead opinion's analysis is that it significantly alters First Amendment jurisprudence by grafting the public-concern requirement of *Connick v. Myers*, 461 U.S. 138 (1983), onto the *Tinker* test, an approach never before taken in student-speech cases by either the Supreme Court or any other federal court of appeals to consider the issue.").

[10] The Student-Athletes' speech did, in fact, touch on matters of public concern. The undisputed basis for starting the petition grew out of concerns about repeated acts of physical violence by coaches, humiliation of players, and even intentional destruction of college recruiting letters. Where these incidents occurred during an extracurricular activity sanctioned by the school, supervised by public employees, and funded with public dollars, these matters are unquestionably matters of public concern.

In *Tinker*, the Court addressed the district court's conclusion that the school officials' action "was reasonable because it was based upon their fear of a disturbance from the wearing of the armbands." In response, the Court stated:

> But, in our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression. Any departure from absolute regimentation may cause trouble. Any variation from the majority's opinion may inspire fear. Any word spoken, in class, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument or cause a disturbance. But our Constitution says we must take this risk
>
> . . .

Tinker, 393 U.S. 508-09. Therefore, to overcome a student's right to freedom of expression, the school must demonstrate facts showing an actual or reasonable forecast of a substantial disruption. *Tinker*, 393 US. at 508; *see also Saxe v. State College Area Sch. Dist.*, 240 F.3d 200, 211 (3d Cir. 2001) (Alito, J.) (*Tinker* mandates "a specific and significant fear of disruption, not just some remote apprehension of disturbance").

The panel erred in its analysis, first, by shifting the burden to the Student-Athletes. *See* App., at *19 (Gilman, J., concurring in the judgment) ("[The lead opinion] improperly places the burden on the students to prove that there would not have been a disruption."). Secondly, the panel erred by relying

upon speculation that amounts to nothing more than undifferentiated fear or apprehension of disturbance. *See* App., at *19 (Gilman, J., concurring in the judgment) ("At most, the defendants have asserted a generalized fear of disruption to team unity based on the students' critical opinion of Euverard's ability as a coach. This is simply not enough to meet the 'substantial disruption' standard of *Tinker*.").[11] Unable to ground their conclusion upon actual evidence of "material and substantial disruption," the panel retreats to the argument that "team morale and unity" are "not susceptible to quantifiable measurement." In so doing, the panel relieves Defendants of their burden under *Tinker* of coming forth with real evidence, such as past arguments between players or evidence of players boycotting practice or refusing to follow a coach's instructions.[12] Further, there is no evidence in the record that the speech was disruptive of school operations at all, a crucial undisputed fact which the

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[11] The panel improperly relied on the testimony of two non-decisionmakers (a player and an assistant coach) to support its conclusion. Even in the area of commercial speech, such "conclusory statements" and "bald assertions" are insufficient to meet the government's burden. *See Pagan v. Fruchey*, 2007 U.S. App. LEXIS 15524 (6th Cir. June 29, 2007) (*en banc*), at **13-14 (citation omitted). Relying upon the conclusory testimony of non-decisionmakers to substitute for real evidence is unprecedented in student speech jurisprudence.

[12] By contrast, *see Pinard*, 467 F.3d at 768-69, where the players refused to participate in a basketball game and *Wildman v. Marshalltown*, 249 F.3d 768, 770 (8th Cir. 2001), where the player advocated a "giv[ing] him [the coach] back some of the bullshit that he has given us."

panel ignores. *See* App., at *19 (Gilman, J., concurring in the judgment).

The panel misconstrues Plaintiffs' argument. Plaintiffs do not argue that *Tinker* requires an actual disruption. Instead, Plaintiffs argue that these facts – demonstrating no past disruption at all – existed at the time Euverard punished the Student-Athletes, and such facts undercut any argument that Defendants reasonably predicted a disturbance. At the time of the interrogations, the petition had existed for a week, and no disruption whatsoever had occurred. At the time the Student-Athletes were dismissed, neither Euverard nor the other Defendants had ever seen the petition and did not know whether two, twenty-two, or all thirty-seven players had signed it. Further, unlike the case of D.B. *v. Lafon,* where a history of racial strife was demonstrated, Defendants have pointed to no evidence that petitions at JCHS had ever caused a disturbance. 2007 U.S. App. LEXIS 3886, at **17-18 (Feb. 21, 2007). Given the dearth of evidence, it would have simply been unreasonable to forecast either a "material" or a "substantial" disruption given the fact that no disruption. *See* App., at *19 (Gilman, J., concurring in the judgment) ("There are no facts in the record suggesting that any disruption could have been reasonably forecast."). At the very least, these facts demonstrate that there is a question of triable fact on this issue.[13]

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[13] By failing to construe the facts in a light most favorable to Plaintiffs, the panel's decision is contrary to the decisions of this Court on the standard to be applied at the summary judgment stage. *See St. John v. Hickey,* 411 F.3d 762, 769-70 (6th Cir. 2005).

The panel's decision also replaces the high hurdle of "material and substantial" disruption of school operations with the low hurdle of "team unity." As Judge Gilman notes, "[v]ague notions of 'teamwork' and 'unity' are simply not compelling school interests in the way that prevention of drug use is." App., at *18 (Gilman, J., concurring in the judgment). Quashing dissent can always be justified with appeals to the need for "unity," and school unity could have been used to prohibit the students in *Tinker* from expressing their opposition to the war in Vietnam. But the panel's decision allows Defendants to define an "educational mission" to fit their own preferences – here "team unity" – then use this amorphous term as a constitutional trump card to ban any speech that Defendants say is contrary to that mission.[14] This analytical error is compounded by the panel's use of purported "common-sense conclusions" as a proxy for actual evidence. Instead of addressing the proof in the record, the panel relies upon a scene from *Hoosiers* and creates two hypothetical situations – a player giving a coach "lip" and a classroom student making a "smart aleck" remark. Then, having set up these constitutional straw men, the panel tears them down through reliance upon supposed "common-sense"

For example, a reasonable jury could find that the petition was cathartic, allowing the players to ignore Euverard, play for each other and their school, and shoulder his outrageous treatment for a few more games in the hopes that the principal would later bring in a new coach.

[14] Recently, the Supreme Court expressly rejected this theory of justifiable restriction on student speech. *See Morse*, 127 S.Ct. at 2637 (Alito, J., concurring).

conclusions, citing a snippet from a Supreme Court case that has nothing at ail to do with *student* speech.[15]

Very recently, this Court rejected just such a flawed analysis in the area of commercial speech, which is subject only to an intermediate level of scrutiny. *See Pagan,* 2007 U.S. App. LEXIS 15524, at *25. Just as the panel here revers "team unity" and tries to use it to avoid the required showing under *Tinker,* so the governmental actors in *Pagan* attempted to invoke "aesthetic objectives" with "some talismanic quality that . . . relieves them of malting the required showing required in *Edenfield." Id.* at * 23. The Court refused to allow assertions of "common-sense" to permit the government to avoid its burden of justifying the restriction on speech. *Id.* at * 28.

While the panel appears to believe it self-evident that "the petition *threatened* team unity," "would *inevitably* increase the tension on the team," and "*necessarily* divided players into two camps," an equally plausible view is that the petition would strengthen team unity. Since eighteen players signed it, and only four refused, the petition could have

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[15] *Tennessee Secondary School Athletic Association v. Brentwood Academy,* 127 S.Ct. 2489, 168 L.Ed.2d 166 (2007), concerned whether an anti-solicitation rule governing a voluntary athletic association violates the First Amendment rights of a private member high school. The court reached the "common sense conclusion" that "hard sell tactics" directed at middle school athletes "strikes nowhere near the . eart of the First Amendment." 127 S.Ct. at 2493, 2495. That is a far cry from *Tinker*, where the government must demonstrate evidence of disruption.

actually unified the team and reduced tension.[16] As this Court said in *Pagan*:

> It is [the government's] obligation to provide *something* in support of its regulation, and we do not find ourselves free to hold that obligation has been discharged based on principles of *common sense* or *obviousness*, especially where, as here, all do not agree as to what is obvious or a matter of common sense. A judicial pronouncement that an ordinance is consistent with common sense hardly establishes that it is so.

Id. Just so here, claims of common sense cannot replace evidence, and a proper application of *Tinker* would have resulted in a finding of protected speech.[17]

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[16] *See* n. 14, *supra*.

[17] While the panel cites nine articles from the sports pages of newspapers from New York to Seattle, conspicuously absent from the panel's decision is a *single citation to a reported decision of this Court on a student speech issue.* Most notably, the panel fails to square this case with *Castorina v. Madison County Sch. Bd.*, 246 F.3d 536 (6th Cir. 2001), the most recent reported student speech case in the Sixth Circuit. *Castorina* is important because it demonstrates the proper application of the *Tinker* standard in this Circuit. Undefined and malleable assertions of the school's interest in promoting "racial harmony" would not have allowed a ban on the Confederate flag T-shirts in *Castorina* any more than claims of "team unity" should here. *Castorina* also emphasizes that viewpoint discrimination is generally not allowed even in the student speech context. There is substantial evidence that

III. The Panel's Decision Is Contrary To Decisions Of The Supreme Court And The Sixth Circuit On What Constitutes An Adverse Action

The most far-reaching effect of the panel's opinion is to alter fundamentally what constitutes an adverse action in *any* case alleging retaliation for the exercise of a constitutional right. In any retaliation case under § 1983, a plaintiff must demonstrate not only that he engaged in protected conduct but also that an adverse action was taken against him "that would deter a person of ordinary firmness from continuing to engage in that conduct." *Dean v. Byerley,* 354 F.3d 540, 551 (6th Cir. 2004). Failing to understand that a retaliation claim does not depend upon the deprivation of a constitutional right, the panel reaches a decision directly contrary to controlling precedent on what constitutes adverse action. *Rutan v. Republican Party Illinois,* 497 U.S. 62, 75 n. 8, 111 L. Ed. 2d 521, 110 S. Ct. 2729 (1990); *Thaddeus-X v. Blatter,* 175 F.3d 378, 398 (6th Cir. 1998) *(en banc).*

There can be no doubt that the First Amendment protects the rights of American citizens to criticize public officials. *Bloch v. Ribar,* 156 F.3d, 673, 681-82 (6th Cir. 1998). The panel implicitly acknowledges this fundamental principle in stating that the school could not suspend the Student-Athletes "for their opinions," emphasizing that their "*regular education*" has not

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Euverard's dismissal of the Student-Athletes was motivated by the views that the Student-Athletes espoused. App., at *20 (Gilman, J., concurring in the judgment).

been "impeded." App., at *15. But the panel suggests that the Student-Athletes could be dismissed from the football team because students have no general constitutional right to participate in a voluntary activity such as football, *see* App., at **5, 12-15. In so doing, the panel completely ignores the fundamental principle that "government actions, which standing alone do not violate the constitution, may nonetheless be constitutional torts if motivated in substantial part by a desire to punish an individual for exercise of a constitutional right." *Thaddeus-X*, 175 F.3d at 386. This fundamental principal is "well-established," *id.*, and has been well-established at least since the 1989 *Rutan* decision.

Struggling to force this case into the mold of government employee cases, the panel seems unaware of the plethora of cases "discussing the level of conduct necessary 'to deter a person of ordinary firmness,'" from exercising his constitutional rights. *See Siggers-Dell v. Barlow,* 412 F.3d 693, 701 (6th Cir. 2005); *Bell v. Blatter,* 308 F.3d 594, 606 (6th Cir. 2002); *Bloch,* 156 F.3d at 681; *Thaddeus-X,* 175 F.3d at 386. Since *Rutan,* it has been clear that retaliation as comparatively insignificant as not giving a birthday party can be an adverse action under the First Amendment. 497 U.S. 62, 75 n. 8. Further, in *Bell* this Court said that a claim should go to the jury "unless the claimed retaliatory action is truly "inconsequential." *Bell,* 308 F.3d at 603.

Thus, in concluding that Student-Athletes have not suffered a constitutional deprivation because playing football is not a constitutional right, the panel has committed error. As Defendants acknowledge, the

ultimate adverse action for high school athlete is permanent dismissal for the team. Moreover, given the types of punishments that have been found to be actionable under § 1983, this certainly presents an issue for the jury.[18] *See, e.g., Thaddeus-X,* 175 F.3d at 399 (deliberate harassment and cold meals); *Siggers-Dell,* 412 F.3d at 701 (transfer from one prison to another); *Sharpe* v. *Cureton,* 1999 US. App. LEXIS 531 (6th Cir. Jan. 13, 1999) (transfer to unfamiliar fire stations and loss of promotional opportunity).

IV. This Appeal Involves Critical Principles Of Freedom Of Expression Under The First Amendment To The United States Constitution

The panel's decision sets a devastating precedent that strikes at the very heart of *Tinker.* Coaches in this Circuit can now, without consequence, punish students for expressing views with which the school officials disagree even if there is no actual evidence of substantial and material disruption. The decision establishes that 800,000 student-athletes in this Circuit have lesser First Amendment rights than the students who do not participate in athletics. Further, unless this Court grants *en banc* review, the rights of students in the Sixth Circuit who express an opinion about an abusive coach are more restricted than the rights of adults to engage in commercial speech to post

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[18] Whether a punishment would "deter a person of ordinary firmness" from the exercise of his constitutional rights is normally a question of fact for the jury. *Bell,* 308 F 3d.

a sign to sell a car. *See Pagan,* 2007 U.S. App. LEXIS 15524.

For all of the above-described reasons, *en banc* review is appropriate and necessary.

DATED this 16th day of August, 2007.

/s/ Michael S. Kelley
Michael S. Kelley (BPR #14378)
Matthew M. Scoggins III (BPR #23126)
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Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Petition for Rehearing *en banc* of Plaintiffs/Appellees has been served upon Richard W. Krieg, Esq. and Linda J. Hamilton Mowles, Esq., LEWIS, KING, KRIEG & WALDROP, P.C., One Centre Square, 5th Floor, 620 Market Street, P.O. Box 2425, Knoxville, Tennessee 37901-2425, via U.S. Mail, postage prepaid, this 16th day of August, 2007.

/s/ Michael S. Kelley

APPENDIX

The Panel Opinion

[The Panel Opinion is omitted here,
but included in this appendix at page 1a]

APPENDIX F

I hate Coach Euvard and I don't want to play for him:

[Fold-out exhibit, see next page]

APPENDIX G

Jefferson County Board of Education

Monitoring: Review: Annually, in May	Descriptor Term: Student Publications
Descriptor Code: 6.704	Issued Date: 09/12/96
Rescinds:	Issued:

STUDENT RIGHTS

The student shall be allowed to responsibly express himself/herself and to disseminate his/her views in writing.[1]

Any student may submit articles and editorials for school-sponsored publications. The procedure for submission of materials shall be published and distributed to all students.

STANDARDS

School-sponsored publications shall adhere to commonly accepted community standards, and no printed material may be distributed which:

1. Is obscene[3]
2. Is libelous[4]

3. May create a material and substantial disruption of the normal school activity or appropriate discipline in the school.[5]

CONTROL AND SUPERVISION

Student publications shall be under the control of the principal. Each school shall have a faculty sponsor who reviews all publications proposed to be distributed in the school by a student or school group.[2]

DISTRIBUTION

School authorities shall regulate the time, manner, place and duration for the distribution of publications on school grounds.

As it pertains to the school, distribution shall be defined as any manner of disseminating written or printed materials equally, systematically or merely at random to several or many persons on school grounds.

APPEALS

If a request for distributing any portion of a student publication is denied by the faculty sponsor, the decision may be appealed to the principal, then to the director of schools, and ultimately to the Board.

Legal References:	Cross References:
1 U S Constitution First Amendment	Use of Copyrighted Materials

2	*Tinker v. Des Moines Independent Community District*, 393 U. S. 503 (1969)	Use of the Internet 4 406
3	*Sharley v. Northwest Ind. School District*, 462 F. 2d 960, 970-71, 5th Cir. 1971	Web Pages 4 407
4	*Schwartz v. Schuker*, 298 F. Supp. 238, 242 (D.C.N.Y. 1969)	Controversial Issues 4 800
5	*Braxton v. Municipal Ct.*, 10 Cal. 3d 138, 514 P. 2d 697, 109 Cal. Rptr. 897 (1973).	

PAGE 759

Plaintiff's Exhibit
Case No. 05CV560

Exhibit No. 4

APPENDIX H

Jefferson County Board of Education

Monitoring: Review: Annually, in April	Descriptor Term: Interrogations and Searches
Descriptor Code: 6.303	Issued Date: 01/10/02
Rescinds: 6.303	Issued: 01/14/99

INTERROGATIONS BY SCHOOL PERSONNEL

Students may be questioned by teachers or principals about any matter pertaining to the operation of a school and/or the enforcement of its rules. Questioning must be conducted discreetly and under circumstances which will avoid unnecessary embarrassment to the student being questioned. Any student answering falsely, evasively or refusing to answer a proper question may be subject to disciplinary action, including suspension.

If a student is suspected or accused of misconduct or infraction of the student code of conduct, the principal may interrogate the student, without the presence of parents(s)/guardians(s) or legal custodians and without giving the student constitutional warnings.

INTERROGATIONS BY POLICE (AT ADMINISTRATOR'S REQUEST)

If the principal has requested assistance by the police department to investigate a crime involving his/her school, the police shall have permission to interrogate a student suspect in school during school hours. The principal shall first attempt to notify the parent(s)/guardians(s) or legal custodians of the student of the intended interrogation unless circumstances require otherwise. The interrogation may proceed without attendance of the parent(s)/guardians(s) or legal custodians. The principal or his/her designee shall be present during the interrogation.

The use of police women or female staff members is desirable in the interrogation of female students.

POLICE-INITIATED INTERROGATIONS

If the police deem circumstances of sufficient urgency to interrogate students at school for unrelated crimes committed outside of school hours, the police department shall first contact the principal regarding the planned interrogation inform him/her of the probable cause to investigate within the school. The principal shall make reasonable effort to notify the parent(s)/guardian(s) or legal custodians of the interrogation unless circumstances require otherwise. The interrogation my proceed without attendance of the parent(s)/guardian(s) or legal custodians. The principal or his/her designee shall be present during the interrogation.

SEARCHES BY SCHOOL PERSONNEL

Any principal, or his/her designee, having reasonable suspicion may search any student, place or thing on school property or in the actual or constructive possession or any student during any organized school activity off campus, including buses, vehicles of students or visitors *(Notice shall be posted in the school parking lot that vehicles parked on school property by students or visitors are subject to search for drugs. Drug paraphernalia or dangerous weapons)*, and containers or packages if he/she receives information which would cause a reasonable belief that the search will lead to discovery of:

1. Evidence of any violation of the law;
2. Evidence of any violation of school rules or regulations or proper standards of the student of faculty conduct;
3. Any object or substance which, because of its presence, presents an immediate danger of harm or illness to any person.

Any student using a locker that is the property of the school system does not have the right of privacy in that locker or its contents. All lockers or other storage areas provided for student use on school premises remain the property of the school system and are provided for the use of students subject to inspection, access for maintenance and search. *Notice shall be posted in each school that lockers and other storage areas are school property and are subject to search.*

A student may be subject to physical search or a student's pocket, purse or other container may be

required to be emptied because of the results of a locker search, or because of information received from a teacher, staff member or other student if such action is reasonable to the principal. All of the following standards of reasonableness shall be met:

1. A particular student has violated policy;
2. The search could be expected to yield evidence of the violation of school policy or disclosure of a dangerous weapon or drug;
3. The search is in pursuit of legitimate interests of the school in maintaining order, discipline, safety, supervision and education of students;
4. The primary purpose of the search is not to collect evidence for a criminal prosecution; and
5. The search shall be reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student, as well as the nature of the infraction alleged to have been committed.

School officials may conduct hand-held or walk-through metal detector checks of a student's person or personal effects.

USE OF ANIMALS

When necessary, dogs or other animals trained to detect drugs or dangerous weapons may be used in conducting searches, but the animals shall be used only to pinpoint areas which need to be searched and shall not be used to search the persons of students, visitors or staff.

SEARCHES BY POLICE

If public health or safety is involved, upon request of the principal who shall be present, police officers may make a general search of students' lockers and desks, or student's or nonstudents' automobiles for drugs, weapons or items of an illegal or prohibited nature.

If the principal has received reliable information which he/she believes to be true that evidence of a crime or of stolen goods, not involving school property of members of the school staff or student body, is located on school property and that any search for such evidence or goods would be unrelated to school discipline or to the health and safety of a student or the student body, he/she shall request police assistance; and procedures to obtain and execute a search warrant shall thereafter be followed.

Anything found in the course of the search conducted in accordance with this policy which is evidence of a violation of the law or a violation of student conduct standards may be:

1. Seized and admitted as evidence in any hearing, trial, suspension or dismissal proceeding. It should be tagged for identification as the time it is seized and kept in a secure place by the principal or the principal's designee until it is presented at the hearing. At the discretion of the principal, the items seized may be returned to the parent or guardian of a student or, if it has no significant value, the item may be destroyed, but only with the express written permission of the director of schools.

2. Any seized item may be turned over to any law enforcement officer. Any dangerous weapon or drug as defined in TCA 49-6-4202 shall be turned over to an appropriate law enforcement official after completion of an administrative proceeding at which its presence is reasonably required.

Whenever the possibility of uncovering evidence of a criminal nature exists, the principal or his/her designee may request the assistance of a law enforcement officer to:

1. Search any area of the school premises, any student or any motor vehicle on the school premises; or

2. Identify or dispose of anything found in the course of a searched conducted in accordance with this policy.

The involvement of law enforcement officials is encouraged when there is reasonable cause to suspect that criminal evidence is about to be uncovered.

Legal References:	Cross References:
1 TCA 49-6-4202 through TCA 49-6-4212	Procedural Due Process 6 302 Child Abuse and Neglect 6 409

APPENDIX I

AMENDMENT I – UNITED STATES CONSTITUTION

Religious and political freedom. – Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

UNITED STATES CODE
TITLE 42. THE PUBLIC HEALTH AND WELFARE
CHAPTER 21 – CIVIL RIGHTS

42 U.S.C. § 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a

declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

I hate Coach Euvard and I don't want to play for him:

EXHIBIT 8

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(2)

No. 07-1567

FILED
JUL 16 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The

Supreme Court of the United States

DERRICK ("RABBIT") LOWERY, a Minor, et al.,

Petitioners/Appellees,

v.

MARTY EUVERARD, DALE SCHNEITMAN, AND CRAIG KISABETH,

Respondents/Appellants.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the petition for writ of certiorari raises a question on which there is genuine conflict for resolution by this Honorable Court as required by Supreme Court Rule 10? Does this case present a genuine conflict when it cannot be said with confidence that two courts have decided the same legal issue in opposite ways based on holdings in different cases with very similar facts?

2. Did the panel majority appropriately apply both the "public concern" test and *Connick v. Myers,* 461 U.S. 138 (1983) to the school case pending before it? Does either *Tinker v. Des Moines Independent School District* or *Morse v. Frederick* require a holding other than as rendered by the Panel in this case?

3. Whether the dismissal from the high school football team is an adverse action so as to violate 42 U.S.C. § 1983 where the student athletes exhibited actions inconsistent with the discipline necessary for inclusion on the football team?

4. Must the petition be denied because there is no requirement in the First Amendment that a brawl or other substantial disruption occur prior to constitutionally acceptable restraint on students' speech? Whether the petitioners' assertion that there is a conflict among circuits regarding the need for disruption is misplaced under the facts of this case?

5. Whether the coaches' activities were clearly established as a violation of the student athletes' rights in October 10, 2005?

PARTIES TO THE PROCEEDINGS

1. The petitioners are students of Jefferson County High School who were involved in the football program of the school, specifically Derrick (Rabbit) Lowery, Randy Giles, Joseph Dooley, Dillon Spurlock and their parents. The petitioners will be referred to in this Opposition Response, collectively, as the "petitioners" or "student athletes".

2. The individual Respondents are Marty Euverard, Dale Schneitman, and Craig Kisabeth, respectively the Head Coach, Principal and Athletic Director of Jefferson County High School.

3. The remaining respondent is Jefferson County Board of Education, the governmental entity responsible for the management and operation of the Jefferson County High School.

All respondents will be collectively referenced in this Opposition Response as "respondents".

STATEMENT REGARDING PARENT/SUBSIDIARY STATUS

Pursuant to Supreme Court Rules 24.1(b) and 29.6, respondents Marty Euverard, Dale Schneitman and Craig Kisabeth are individuals.

Respondent Jefferson County Board of Education is a governmental entity and is, therefore, not a nongovernmental corporation with parent or subsidiary status.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDINGS ii

STATEMENT REGARDING PARENT/SUBSIDIARY STATUS iii

TABLE OF CONTENTS iv

TABLE OF AUTHORITIES vi

STATEMENT OF ADDITIONAL CONTROLLING CASE FACTS OMITTED FROM PETITION FOR WRIT OF CERTIORARI 1

REASONS FOR DENYING THE PETITION 10

1. This petition for writ of certiorari does not raise any question on which there is genuine conflict for resolution by this Honorable Court as required by Supreme Court Rule 10. Further, this case does not present a genuine conflict since it cannot be said with confidence that two courts have decided the same legal issue in opposite ways based on holdings in different cases with very similar facts 10

2. The panel majority did not misapply both either the "public concern" test or *Connick v. Myers,* 461 U.S. 138 (1983) to the instant case involving school speech. Neither *Tinker v. Des Moines Independent School District* nor *Morse v. Frederick* requires a holding other than as rendered by the Panel in this case 14

TABLE OF CONTENTS – Continued

Page

3. The dismissal of the student athletes from the high school football team was not an adverse action so as to violate 42 U.S.C. § 1983 where the student athletes exhibited actions inconsistent with the discipline necessary for inclusion on the football team and where participation in extracurricular activities is not a constitutional right 19

4. The petition should be denied because there is no requirement in the First Amendment that a brawl or other substantial disruption occur prior to constitutionally acceptable restraint on students' speech. The petitioners' argument that there is a conflict among circuits regarding the need for disruption is misplaced under the facts of this case..... 22

5. It was not clearly established on October 10, 2005, when the respondents were called upon to address the student petition and the subsequent insubordination of the plaintiffs, that the actions taken would have been a violation of any of the student athletes' constitutional rights..... 27

CONCLUSION 29

TABLE OF AUTHORITIES

Page

CASES:

Alerding v. Ohio High School Athletic Ass'n, 779 F.2d 315 (6th Cir. 1985) 20

Angstadt v. Midd-West Sch. Dist., 377 F.3d 338 (3d Cir. 2004) 20

Ashwander, et al. v. Tennessee Valley Authority, et al., 297 U.S. 288, 56 S.Ct. 466, 80 L. Ed. 688 (1936) 13

Bailey v. Truby, 321 S.E.2d 302 (W.Va. 1984) 19

Bethel School Dist. No. 403, 478 U.S. 675 (1986) 20, 21, 23, 26

Brentwood Academy v. Tennessee Secondary Sch. Athletic Ass'n, 180 F.3d 758 (6th Cir. 1999), rev'd on other grounds, 531 U.S. 288, 121 S. Ct. 924, 148 L. Ed. 2d 807 (2001) 15, 20

Connick v. Myers, 461 U.S. 138 (1983) 14, 29

Crocker v. Tennessee Secondary Sch. Athletic Ass'n, 980 F.2d 382 (6th Cir. 1992) 20

Hamilton v. Tennessee Secondary School Athletic Association, 552 F.2d 681 (6th Cir. 1976) 19

Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988) 21, 23, 25

Lowery v. Euverard, Sixth Circuit Court of Appeals No. 06-6172, filed August 3, 2007, petition for certiorari pending, No. 07-1567 ..... *passim*

Mitchell v. Louisiana High School Association, 430 F.2d 1155 (5th Cir. 1970) 19

TABLE OF AUTHORITIES – Continued

Page

Morse v. Frederick, 127 S. Ct. 2618 (2007) 17, 18

Niles v. University Interscholastic League, 715 F.2d 1027 (5th Cir. 1983) 20

Seamons v. Snow, 206 F.3d 1021 (10th Cir. 2000) 24, 25

Tenn. Secondary Sch. Ath. Ass'n v. Brentwood Acad., 127 S. Ct. 2489 (2007).....15

Tinker v. Des Moines Independent School District, 393 U.S. 503 (1969) 16, 20, 26

Veronia School District v. Acton, 515 U.S. 646 (1995).....7

West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 63 S. Ct. 1178, 87 L. Ed. 16 (1943).....24

Wildman v. Marshalltown, 249 F.3d 768 (8th Cir. 2001).....12, 13, 14, 25

STATUTES AND RULES:

42 U.S.C. § 1983 .....19, 22

Supreme Court Rule 10.. .....10, 11, 14

TREATISES:

Supreme Court Practice (Eighth Edition) § 4.4 11

STATEMENT OF ADDITIONAL CONTROLLING CASE FACTS OMITTED FROM PETITION FOR WRIT OF CERTIORARI

Petitioners' case focuses entirely on the written document identified as a petition that had as its heading "I hate Coach Euvard (sic) and I don't want to play for him". Petitioners assert that this document was the basis for the student athletes' dismissal from the Jefferson County High School football team. [Petition for Certiorari, p. 8][1] Neither the student athletes nor their parents mention the student athletes' own actions when the football coaches were trying to understand the impact that this petition would have on the school's football program.[2] Petitioners are so intent to assert their constitutionally protected First Amendment right to free speech that they ignore the affect that the students' ***subsequent*** disobedience, defiance and rank insubordination had

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[1] When referencing the case at bar, *Lowery v. Euverard*, Sixth Circuit Court of Appeals No. 06-6172, filed August 3, 2007, petition for certiorari pending, No. 07-1567, the case will be identified as *Lowery*.

[2] Petitioners' only concession to the fact that there were actions other than the petition that may have been involved in the expulsion of the student athletes from the football team is a statement at page 8 of their petition that "There is a factual dispute as to the basis for the dismissal of these three students . . . " Respondents submit that there is no "factual dispute" when the scenario is viewed in its entirety.

on the high school football program, team and individual players.[3]

Jefferson County High School football player Brett Denton testified that there were many players who had signed the petition but who remained on the team, for both the 2005 and 2006 seasons. [Denton, T.R. Vol. II, pp. 127/22-128/5, Apx. 686-687] Thus, the presence of a player's signature on the petition was not the ticket to expulsion from the Jefferson County High School football team in October 2005. In spite of the so-called petition, if the players confirmed to Coach Euverard that they wanted to play football for him, they remained on the team. [Euverard, T.R. Vol. II, p. 163/15-20, Apx. 697, pp. 171/14-172/17, Apx. 705-706] There is no evidence that the petitioner student athletes would not also have had the same option to remain on the team. However, they exhibited insubordination and disobedience toward the coaching staff **subsequent** to the students' actions in signing the petition.

Rather, student athletes Lowery, Giles and Dooley refused to comply with direct instructions of the coaching staff while Head Coach Euverard was

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[3] The incident subject of this petition for certiorari is related to a second lawsuit styled *Jeff Lowery, et al. v. Jefferson County Board of Educ, et al.*, a case tried in the Eastern District of Tennessee to a jury verdict for defendants, affirmed by the trial court with an attorneys' fee award to defendants, now in the initial stages of appeal to the Sixth Circuit Court of Appeals at No. 07-6324.

meeting with the individual players about the petition and the players' intent to play football under his direction. Students in the locker room on October 10, 2005, testified that they knew there would be repercussions to Lowery, Giles and Dooley based on their confrontational attitude and refusal to comply with Coach Pippenger's request to come outside to speak privately. Specifically, Assistant Coach Pippenger asked petitioner Lowery three times to "Come here, please" but Lowery refused to comply. [J. Giles, T.R. Vol. I, pp. 83/11-84/5, Apx. 598-599; Lowery, T.R. Vol. II, p. 82/8-17, Apx. 652] Lowery even said "Don't put your hands on me" [J. Giles, T.R. Vol. I, p. 84/17-19, Apx. 599; Lowery, T.R. Vol. II, p. 83/7-17, Apx. 653] even though student athlete Giles said it is not unusual for football coaches to touch football players at any time. [J. Giles, T.R. Vol. I, p. 85/13-16, Apx. 600]

At this point, student athletes Giles and Dooley got up to stand in solidarity with Lowery [Lowery, T.R. Vol. II, p. 84/7-24, Apx. 654] even though this action was, in itself, also directly disobeying the Coach's instruction to remain seated and quiet while the individual player interviews were conducted. [J. Giles, T.R. Vol. I, p. 86/8-10, Apx. 601] The players observing this disrespect, combativeness and impudence toward Coach Pippenger recognized that the student athletes' actions were incompatible with the

discipline necessary for a team sport such as football.[4] [Denton, T.R. Vol. I, pp. 126/10-127/5, Apx. 685-686; Manis, T.R. Vol. II, pp. 200/13-201/17, Apx. 717-718]

The student athletes continued their abject defiance by refusing to meet with Coach Euverard in the way he directed and which was the same way all the other players had met with him, individually. Rather, they refused to come individually, saying in essence that the coach would have to take all three of them or none of them. These actions are omitted from the petition for writ of certiorari, even though the testimony of the players sitting in the locker room was that there would be significant consequence to Lowery, Giles and Dooley, not because of their involvement with the petition, but because of how they were acting in the locker room, i.e., insubordination, combativeness and disrespect. [Denton, T.R. Vol. II,

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[4] The Panel did not address Dillon Spurlock's first amendment claim in recognition of the fact that **Spurlock voluntarily quit the team** by his individual affirmation that he did not want to play football for the head coach of the team, Coach Euverard. [Spurlock, T.R. Vol. I, pp. 26/11-27/10, Apx. 562-563; p. 33/13-19, Apx. 569] Coach Euverard testified that he **believed Dillon's statement to be an intention to quit the team**, [Euverard, T.R. Vol. II, pp. 168/22-169/8, Apx. 702-703; p. 184/16-25, Apx. 710] an understanding echoed by Coach Brimer [Brimer, T.R. Vol. II, p. 67/7-8, Apx. 643] and **uncorrected by Dillon himself** at any time after the incident up through and into this litigation. [Spurlock, T.R. Vol. I, p. 45/6-25, Apx. 574; pp. 31/25-32/3, Apx. 567-568] The focus of this Opposition Response is, therefore, on the claims of Giles, Lowery and Dooley, the other three petitioner student athletes.

pp. 112/15-113/1, Apx. 676-677, p. 124/8-12, Apx. 683; Lowery, T.R. Vol. II, pp. 93/22-94/18, Apx. 661-662]

Coach Euverard testified that none of the student athletes were dismissed from the football team for creating, circulating or signing the petition, i.e., for exercising their First Amendment right to free speech. [Euverard, T.R. Vol. II, pp. 162/21-163/14, Apx. 696-697; p. 170/16-18, Apx. 704] Rather, Spurlock quit the team voluntarily and Dooley, Giles, and Lowery were dismissed from the team for insubordination; specifically, for not doing what he directed them to do, for their defiance and confrontation with Coach Pippenger, and, in Dooley's case, for yelling at the rest of the team as they left the locker room. [Euverard, T.R. Vol. II, p. 163/21-25, Apx. 697; p. 189/9-16, Apx. 713]

Football player Brett Denton testified consistent with testimony of the Jefferson County High School football coaching staff that Lowery, Dooley and Giles' actions substantially and materially affected the football program at Jefferson County High School by destroying team unity. [Denton, T.R. Vol. I, pp. 126/10-127/5, Apx. 685-686] Denton continued to say that the team cannot function when some of the players like the coach and some are working against him. [Denton, T.R. Vol. II, p. 127/9-12, Apx. 686]

Football player Michael Manis confirmed in his testimony that the disrespectful attitude exhibited by these players cannot be tolerated by a football coach. Conduct such as exhibited by the student athletes

substantially and materially interferes with the football team and its program because it shows disrespect for the coach, players and teammates. [Manis, T.R. Vol. II, pp. 200/13-201/17, Apx. 717-718]

Coach Euverard testified about the importance of football and coaching as it is interwoven with the educational mission of the school by stating that coaching is important because it teaches student athletes responsibility, leadership, and life skills that will assist them in future years, not just on the athletic field. [Euverard, T.R. Vol. II, p. 162/12-20, Apx. 696] Insubordination cannot be tolerated on a football team where everyone has to be following the same authority figure for the football team to succeed. [Euverard, T.R. Vol. II, p. 167/6-9, Apx. 701]

Coach Brimer stated that if a player is insubordinate or refuses to obey a direct instruction from the coach, this destroys team unity. Insubordination that is permitted without consequence results in the coach being unable to be a leader with the corresponding result that the team has no effective direction. [Brimer, T.R. Vol. II, p. 63/6-15, Apx. 640][5]

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[5] Petitioners repeatedly disparage the panel majority for its reference to materials other than stare decisis precedent, such as the movie *Hoosiers* and news articles about players and coaches on various professional athletic teams, as if the role of high school coach Euverard should be considered in a vacuum. The panel's reference to these incidents simply recognizes the reality that discipline, or the lack thereof, for athletic teams, in

(Continued on following page)

This Honorable Court noted in *Veronia School District v. Acton*, 515 U.S. 646, 654-657 (1995) (internal citations omitted):

> While we do not, of course, suggest that public schools as a general matter have such a degree of control over children as to give rise to a constitutional "duty to protect," we have acknowledged that for many purposes "school authorities act *in loco parentis,*" with the power and indeed the duty to "inculcate the habits and manners of civility." Thus, while children assuredly do not "shed their constitutional rights . . . at the schoolhouse gate," the nature of those rights is what is appropriate for children in school. . . . By choosing to "go out for the team," they voluntarily subject themselves to a degree of regulation even higher than that imposed on students generally. . . . Somewhat like adults who choose to participate in a "closely regulated industry," students who voluntarily participate in school athletics have reason to expect intrusions upon normal rights and privileges, including privacy.

Respondents submit that the panel majority correctly identified the question to be answered in this case at page 6 of the opinion:

> This case is not primarily about Petitioners' right to express their opinions, but **rather**

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or outside the academic setting, has consequences to the team as a whole as well as to the individual team members.

> **their alleged right to belong to the Jefferson County football team on their own terms.** The specific question presented by this case is whether Petitioners had a right to remain on the football team after participating in a petition that stated "I hate Coach Euvard [sic] and I don't want to play for him." (Emphasis added)

Rather than being the operative event triggering their dismissal, the only role the petition played in the student athletes' dismissal from the team was that it gave an opportunity for them to demonstrate their disrespect, disobedience and impudence through their subsequent actions in the locker room. The refusal of the student athletes to follow direct orders of Coach Pippenger together with the subsequent refusal to comply with the instructions of Coach Euverard exhibited the insubordination that was the basis for their dismissal from the football team.

The written expression of their hatred in the petition may have prompted the individual player interviews in October 2005; but, in contradistinction to the other players who also signed the document, the only football players who were dismissed from the team were the student athletes who exhibited locker room insubordination. In short, it was their

insubordination that resulted in their expulsion from the football team.[6]

This petition for writ of certiorari does not demand resolution of a federal question of constitutional dimension, notwithstanding petitioners' attempt to characterize it otherwise. The Sixth Circuit majority correctly determined that this case related to the ability of the Coach to discipline student athletes who were insubordinate, insolent and totally unwilling to obey even the mildest of direction from the football coaching staff. The petition for review by this Honorable Court should be denied.

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[6] At the end of the petition for writ of certiorari the petitioners cite to three news reports/articles regarding sexually abusive coaches, etc. Respondents object to the inclusion of this type material in this case inasmuch as there is no evidence or even allegation that such wrongdoing was directed to the petitioners or that this type activity occurred at the Jefferson County High School by any of the coaches in the football program. The inclusion of these inflammatory and prejudicial articles should be ignored where they have no relevance to the events as claimed by the plaintiff petitioners and where the inferences attached to them border on libel as to these respondents.

REASONS FOR DENYING THE PETITION

1. This petition for writ of certiorari does not raise any question on which there is genuine conflict for resolution by this Honorable Court as required by Supreme Court Rule 10. Further, this case does not present a genuine conflict since it cannot be said with confidence that two courts have decided the same legal issue in opposite ways based on holdings in different cases with very similar facts.

This petition for writ of certiorari is governed by the Rules of the Supreme Court, noting that a writ of certiorari is only granted for compelling reasons. Therefore, the guidelines in Supreme Court Rule 10 state the nature of the reasons for which review is mandated.[7] Rule 10(a) states, in part, as follows:

> Supreme Court Rule 10: A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:
>
> (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that

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[7] It is significant to note that the petitioners do not cite to Supreme Court Rule 10 in their petition to this Court.

> conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;. . . .

There must be an intolerable conflict on the same matter of law or fact, not merely an inconsistency in dicta or in the general principles utilized. Rule 10 requires a genuine conflict on an important federal issue. A genuine conflict, as opposed to a conflict in principle, occurs when it can be said with confidence that two courts have decided the same legal issue in opposite ways, based on their holdings in different cases with very similar facts. *Supreme Court Practice,* (Eighth Edition) § 4.4. The petitioners' protestations notwithstanding, the petition fails to provide evidence of a genuine conflict mandating this Court's attention or resolution.

While the petitioners stress the conflict between the student athletes and respondents as well as the conflict between their personal opinions and that of the Sixth Circuit, the conflict referenced in Supreme Court Rule 10 requires **a genuine conflict** on an important federal issue among two different courts of appeals. Respondents submit that there is no court of appeals decision that conflicts with the Sixth Circuit's decision on the same issues, facts, discipline exacted and rationale. Rather, the Sixth Circuit is in line with its sister courts under the facts presented to it in this case.

The Eighth Circuit considered a case in *Wildman v. Marshalltown,* 249 F.3d 768 (8th Cir. 2001) and rendered a decision that is consistent with and incredibly close to the fact scenario in *Lowery*. The plaintiff in *Wildman* was a basketball player on a high school girls' varsity team who wrote and distributed a letter to her teammates critical of the coach and how the team was being handled. The letter was sent to the coach by one of the parents and the school administration met with the plaintiff to discuss her issues with the coach. They told the plaintiff that the letter was disrespectful and demanded that she apologize to her teammates within twenty-four hours of their meeting. The plaintiff was further told that if she did not apologize, she would not be allowed to return to the basketball court, i.e., she would be off the team. She did not apologize and did not play any more that season.

In affirming the actions of the coaches in *Wildman*, the Eighth Circuit specifically acknowledged that there is a right to express opinions while on school premises, but then further acknowledged that this right is not absolute. School officials have the authority to prohibit the public expression that is in opposition to the teaching of civility and sensitivity in the expression of opinions. 249 F.3d at 771. The opinion continues to note that coaches have a legitimate interest in affording the plaintiff's teammates an educational environment conducive to learning team unity and sportsmanship, and an educational environment that is free from disruptions and

distractions that could hurt the cohesiveness of the sports team, which in *Wildman* related to basketball. 249 F.3d at 771. The Eighth Circuit further noted that coaches in an academic setting deserve a certain amount of respect from their student athlete players, perhaps even more than would be required in a non-academic arena. 249 F.3d at 772.

Petitioners have not pointed out a decision of another court of appeals that is in conflict with the Sixth and Eighth Circuit Courts of Appeals where the facts and issues of law are the same but where the decisions are contradictory.

Where there is no genuine conflict, a petition for writ of certiorari seeks nothing more than an advisory opinion, the type of opinion that the Supreme Court is not empowered to render. The judicial power of the Supreme Court does not extend to the determination of abstract questions. *Ashwander, et al. v. Tennessee Valley Authority, et al.*, 297 U.S. 288, 325, 56 S. Ct. 466, 473, 80 L. Ed. 688, 699 (1936). The term "cases of actual controversy" connotes a controversy of a justiciable nature, excluding advisory decrees upon hypothetical facts. *Id.*

There being no genuine conflict, Supreme Court Rule 10 is not satisfied and the petitioners' request for a writ of certiorari to the Sixth Circuit must be denied.

2. The panel majority did not misapply both either the "public concern" test or *Connick v. Myers*, 461 U.S. 138 (1983) to the instant case involving school speech. Neither *Tinker v. Des Moines Independent School District* nor *Morse v. Frederick* requires a holding other than as rendered by the Panel in this case.

Petitioners asserted in the appellate court that *Wildman* is wrongfully decided, and thus *Lowery* is wrongly decided, based on their analysis of *Tinker v. Des Moines Independent School District*, 393 U.S. 503 (1969). Respondents submit to this Honorable Court that the petitioners' disagreement with *Wildman* and *Lowery* does not create a conflict under Rule 10. Respondents further submit, contrary to petitioners' argument, that the panel majority did not wrongly apply *Connick v. Myers,* 461 U.S. 138 (1983) or the "public concern" test to *Lowery*; rather, the panel majority decided *Lowery* based on the requirements of *Tinker* and then further supported its decision by reference to the *analogous rationale* of *Connick*.

> Thus, the petition was not protected by *Tinker,* and Respondents did not violate Petitioners' First Amendment rights by removing them from the football team. Because there was no constitutional violation, it is not the Court's place to approve or disapprove of Euverard's actions.

> This **conclusion is supported by the analogous reasoning** of the Supreme Court in *Connick v. Myers*, 461 U.S. 138 (1983). . . .
>
> [*Lowery,* Majority Opinion, p. 12]

This use of an analogy to support a Court's decision is evidenced and supported by this Court's recent decision *Tenn. Secondary Sch. Ath. Ass'n v. Brentwood Acad.*, 127 S. Ct. 2489, 2495-2496 (2007) (emphasis added):

> **Just as** the government's interest in running an effective workplace can in some circumstances outweigh employee speech rights, see *Connick v. Myers*, 461 U.S. 138, 103 S. Ct. 1684, 75 L. Ed. 2d 708 (1983), **so too** can an athletic league's interest in enforcing its rules sometimes warrant curtailing the speech of its voluntary participants. . . . **[H]igh school football is a game. Games have rules.**

In *Lowery,* the panel majority did not apply the *Connick* decision to decide the case before it and the majority did not impose any "public concern" blanket over general student speech jurisprudence. Rather, the panel majority decided the matter using the *Tinker* analysis and then noted, as additional support for its decision, the analogous government employment situation applicable in *Connick*. This Honorable Court did the same thing in the *Brentwood* decision above cited. Clearly, using an analogy as illustration for the validity of the case holding is not error sufficient to require review by writ of certiorari.

Indeed, the majority confirmed the analogous nature of the reference to *Connick* decision in its footnote 5 at page 33a of the petition in this case.

> We respectfully disagree with Judge Gilman's assertion that we are grafting a public-concern requirement onto *Tinker*. Our holding in no way rests on a determination of whether Plaintiffs' speech touched on a matter of public or private concern. *Tinker* cases must be evaluated in the context in which they occur, and for the reasons stated above students who participate in voluntary athletic programs bear some similarities to government employees. We cite to *Connick* for the proposition that it is reasonable to forecast that disruption will occur when a subordinate challenges the authority of his or her superior.

This Court in the *Brentwood* decision cited above recognizes that "high school football is a game. Games have rules." Respondents submit that one of those "rules" is that the coach is to be obeyed, even if he is not liked. The *Brentwood* decision relates to athletic associations and not individual players; however, while the fact application is different, the principle is the same. The fundamental rule in high school football, and one of the reasons the program is provided to so many schools in our country, is that it teaches discipline, leadership, civility, respect for oneself and for others, to name only a few of the laudable concepts associated with sports programs of all types. Underpinning the football program is the

bedrock of respect for the coach along with a willingness to implicitly follow his instruction without question. Players who refuse to do so cannot remain as part of the team as their presence disrupts and undermines the ultimate authority of the coach. Notably, respect for the coach is singularly different than liking the coach.

Finally, petitioners have asserted that this Court's decision in *Morse v. Frederick,* 127 S. Ct. 2618 (2007) was violated by the Sixth Circuit Court of Appeals decision in some way. Respondents, however, submit that just as with the multitude of other cases cited by the petitioners, the fact pattern in *Morse* is totally different than that which is at issue in *Lowery* so as to render the *Morse* decision inapposite.

1) The *Morse* speech was related to drug usage, i.e., marijuana, although student said it was just for fun. The *Lowery* petition related to opinion against the head football coach – "I hate Coach Euvard and don't want to play football for him." – speech evidencing the antithesis of civility and respect that is to be taught at the school and, especially, in the athletic program.

2) The *Morse* speech, the sign, was off school property, across the street facing the school. In *Lowery,* the speech, the petition, was in school and on school premises as well as in parking lot, etc. Furthermore, the disobedient, combative and insubordinate "speech" occurred in the locker room, in view of other team members.

3) The *Morse* speech evidenced no disruption of class or school work. In *Lowery,* while the petitioners discount the effect of the petition, respondents provided testimony of the adverse affect the subsequent insubordination had on the football program, undermining the discipline and role of head coach as authority figure.

4) In *Morse,* the student was suspended for five days because of the sign and subsequent refusal to relinquish it. He was then suspended an additional five days because of his protest to the discipline and quoting Thomas Jefferson on free speech. In *Lowery,* the players were dismissed from the football team *not because of the petition* but because of their subsequent **insubordination.**

In short, *Morse* does not require an outcome other than that rendered by the appellate panel inasmuch as its facts render the decision inapposite. The Sixth Circuit did not err in its decision in the *Lowery* matter nor did it err in the rationale it used to achieve its decision. There is no "public speech" connotation to the decision, it did not improperly rely on a governmental employee situation to render its decision, and the decision is not in conflict with either *Tinker* or *Morse.* The petition for writ of certiorari should be denied.

3. The dismissal of the student athletes from the high school football team was not an adverse action so as to violate 42 U.S.C. § 1983 where the student athletes exhibited actions inconsistent with the discipline necessary for inclusion on the football team and where participation in extracurricular activities is not a constitutional right.

The respondents contend that the document at issue, i.e, the petition, should not be granted First Amendment protection status, and the two-judge majority Panel concurred. However, even under Judge Gilman's concurring decision where the petition was given constitutional protection, the outcome remains the same – no violation of a constitutional right occurred and the expulsion from the athletic team was not an adverse action under 42 U.S.C. § 1983 so as to subject the respondents to liability.

The law is clear that a person does not have a liberty interest subject to due process protection to participate in interscholastic athletics. *See Hamilton v. Tennessee Secondary School Athletic Association,* 552 F.2d 681 (6th Cir. 1976); see also *Mitchell v. Louisiana High School Association,* 430 F.2d 1155 (5th Cir. 1970); *Bailey v. Truby,* 321 S.E.2d 302 (W.Va. 1984). Indeed, the two-judge majority in *Lowery* stated:

> It is well-established that students do not have a general constitutional right to participate in extracurricular athletics. See

> *Brentwood Academy v. Tennessee Secondary Sch. Athletic Ass'n*, 180 F.3d 758, 763 (6th Cir. 1999), rev'd on other grounds, 531 U.S. 288, 121 S. Ct. 924, 148 L. Ed. 2d 807 (2001); *Alerding v. Ohio High School Athletic Ass'n*, 779 F.2d 315 (6th Cir. 1985); *Angstadt v. Midd-West Sch. Dist.*, 377 F.3d 338 (3d Cir. 2004); *Niles v. University Interscholastic League*, 715 F.2d 1027 (5th Cir. 1983). As this Court has noted, "[t]he main purpose of high school is to learn science, the liberal arts and vocational studies, not to play football and basketball." *Crocker v. Tennessee Secondary Sch. Athletic Ass'n*, 980 F.2d 382, 387 (6th Cir. 1992).

Lowery v. Euverard, Sixth Circuit Court of Appeals No. 06-6172 5, filed August 3, 2007, petition for certiorari pending, No. 07-1567.

Even under a *Tinker* analysis the Constitution does not compel "teachers, parents, and elected school officials to surrender control of the American public school system to public school students." *Bethel School Dist. No. 403,* 478 U.S. 675, 686 (1986). The Supreme Court further stated in *Bethel School Dist.* that "schools must teach by example the shared values of a civilized social order." 478 U.S. at 683. When these "shared values" come in conflict with one another, our society places a high value on independence of thought and frankness of expression but this must be placed in juxtaposition with the equally high value placed on discipline, courtesy and respect for authority, subjects that are especially suited for the

athletic field and the relationship between coach and athlete.

It is clearly established that the constitutional rights of public school students "are not automatically coextensive with the rights of adults in other settings," *Id.,* at 682, and a school need not tolerate speech that is inconsistent with its pedagogical mission, even though the government could not suppress that speech outside of the schoolhouse. See *Hazelwood Sch. Dist. v. Kuhlmeier,* 484 U.S. 260, 266 (1988).

It is undisputed that schools teach in circumstances other than the academic classroom. One place that is particularly suited to respect, authority and discipline, whether self discipline or respect for the discipline imposed by others, is on the athletic field. Respondents submit that the student athletes were not deprived of their academic education by virtue of their expulsion from the team. Rather, the student athletes exhibited their refusal to be instructed by Coach Euverard and his staff, by their own disregard for the authority of the coaches in the locker room and by their own acts of insubordination separate and totally apart from their involvement with the petition. This is specifically the type of behavior that this Supreme Court has stated a school need not tolerate. *Hazelwood Sch. Dist.,* 484 U.S. at 266. Where the actions of the student athletes completely undermined the respect for the coaches, the remaining team players knew, without anyone telling them, that there would be severe consequences to these student

athletes. Indeed, these players stated that the team unity could not survive if there were not some extreme action taken by the coaches.

There is no constitutional right for these petitioners to play football on a high school team when these students have exhibited a refusal to abide by the directions and instructions issued by the coach. The actions of the respondents were not in violation of any constitutional right of these petitioners and the actions were not of the nature to constitute an adverse action under 42 U.S.C. § 1983.

The petition for writ of certiorari should be denied.

4. The petition should be denied because there is no requirement in the First Amendment that a brawl or other substantial disruption occur prior to constitutionally acceptable restraint on students' speech.

The panel correctly noted that constitutionally acceptable restraint on a student's speech does not require evidence that the school's activities or programs be sidelined before the regulatory action can pass constitutional muster. Specifically, the panel majority decided that it was reasonable, under the facts of this case, for the respondents to believe that the petition would disrupt the football program by eroding the coach's authority and dividing players into opposing camps, noting:

> This belief was bolstered by Petitioners' insubordinate and disruptive acts at the team meeting.
>
> [Opinion at p. 12]

This Court has stated that a school need not tolerate speech that is inconsistent with its pedagogical mission, even though the government could not suppress that speech outside of the schoolhouse. *Hazelwood Sch. Dist.*, 484 U.S. at 266. Further, even under a *Tinker* analysis, the Constitution does not compel "teachers, parents, and elected school officials to surrender control of the American public school system to public school students." *Bethel School Dist. No. 403,* 478 U.S. at 686 (1986). Requiring the school program to be halted due to conflict and disruption before granting the school personnel protection from a claim for violation of First Amendment rights effectively holds the school hostage to student will, thereby putting the students in charge of the school system and resulting in a situation that is clearly not constitutionally required. Petitioners' argument does not support this Court granting the petition for writ of certiorari.

Petitioners further assert that there is "strong conflict" among circuits as to whether there is a need for disruption in school speech cases before allowing intrusion into the free speech rights of the students. Respondents submit that this argument is in error as it is applied to the *Lowery* case.

Lowery, Giles and Spurlock were dismissed from the team because of their refusal to obey direct instructions from Coach Pippenger as well as from Coach Euverard. Their combative attitude and actions exhibited toward Coach Pippenger and then continued toward Coach Euverard was conducted in view of many, if not all, of the team players in the locker room. Several players testified as to their expectation that there would be significant consequences to these three players because of their clear defiance of the coaches in the locker room, not in any way related to the petition, its creation or content.

This is what distinguishes *Lowery* from the cases cited by the petitioners. Players who demonstrate abject refusal to obey the coach in front of the rest of the team are putting themselves in a position where the coaching staff has little else it can do to maintain control and respect of the team than to eject those student athletes from the team.

The cases cited by the petitioners do not provide similar facts for comparison with those in *Lowery.* For example, petitioners refer to the 1943 Supreme Court decision in *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 63 S. Ct. 1178, 87 L. Ed. 16 (1943) at page 25 of the petition. However, this is a decision that relates to refusal to participate in compulsory saluting the flag on religious grounds. Clearly this is inapposite to the *Lowery* situation. Petitioners also reference *Seamons v. Snow,* 206 F.3d 1021 (10th Cir. 2000) in which a high school player was dismissed from an athletic team for refusing to

apologize for the exercise of his free speech rights in his reporting of a hazing incident where he was assaulted in the football team's locker room.

The Eighth Circuit distinguished the facts in *Seamons* from those in *Wildman* where the letter written against the basketball coach constituted insubordinate speech toward the coaches. The *Wildman* court stated that "in an athletic context void of the egregious conduct which spurred the football player's speech about the hazing incident in *Seamons* and where Wildman's speech called for an apology, no basis exists for a claim of a violation of free speech." 249 F.3d at 772. The *Lowery* case, in contrast, is in line with *Wildman* and the *Seamons* facts are inapposite. It is the *Wildman* rationale that the Sixth Circuit majority followed and which is totally consistent and not in conflict with the decisions from sister circuits on the same facts, as required by Rule 10. The *Seamons'* decision simply does not have the same factual predicate as *Lowery* and, thus, is not an appropriate precedent to guide the decision in *Lowery*.

It is respectfully submitted that the First Amendment is not offended by an educator taking action to restrict or discipline student speech that is discourteous and insubordinate to the school faculty or administration, as long as their actions are reasonably related to legitimate pedagogical concerns. *Hazelwood Sch. Dist.*, 484 U.S. at 266 (1988). The Supreme Court has always supported the concept that civility is a legitimate pedagogical concern. This

is part of the educational mission of the school, to teach young people how to function appropriately in the world at large.

Respondents agree that it is axiomatic that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate," and that the school administration and faculty "do not have absolute authority" over their students. *Tinker,*, 393 U.S. at 506. However, school officials also do not need to cower in the corner so as to abdicate their function of maintaining order and control of the public school system by handing it over to the public school student for fear of federal court reprisal. See *Tinker,* 393 U.S. at 526; *Bethel School District No. 403,* 478 U.S. at 686.

The petitioners take issue with the Panel's reference to numerous sporting articles, movies, newspapers, prominent teams and athletes, asserting that this is improper in the judicial decision. Respondents submit that these references are simply the recognition that discipline is required in any type of athletic forum and the high school football team is not exempt from this aspect of sports and athleticism.

The Sixth Circuit properly determined this *Lowery* case and there is no compelling reason for this Court to accept the petition for writ of certiorari.

5. It was not clearly established on October 10, 2005, when the respondents were called upon to address the student petition and the subsequent insubordination of the plaintiffs, that their actions would have been a violation of any of the student athletes' constitutional rights.

Incredibly, the petitioners' final point is that this petition for writ of certiorari should be granted because the right to criticize an abusive school official without disruption was clearly established in October 2005, the time when these respondents were required to address the situation. Respondents assert that the fallacy in this proposition is evident in a brief review of the *Lowery* decision itself. The three judges forming the panel on this case came to a two-to-one split. Two judges held that there was no constitutional violation of free speech rights because the petition was not subject to constitutional protection. One judge held that the speech was constitutionally protected but that this was not clearly established in October 2005 so the respondents were subject to immunity. Hence, all three judges dismissed the claim.

Clearly, if three respected jurists could not agree on whether the speech was constitutionally protected and, if so, whether it was clearly established as such, the coaches of the Jefferson County High School football team could not be expected to know this. The jurists have as much time as they want to consider, read, ponder, discuss and arrive at a conclusion

which, in this case was uniform in result but on different rationales. The coaches, on the other hand, were faced with a petition stating hatred of the head coach. They needed to evaluate the situation before the next game. They called all the team in, conducting player interviews one by one. The decision was made. Allow all the team members who did not sign the petition to remain on the team. Allow all the team members who did sign the petition but recanted and said they would play for the head coach to remain on the team. There is no evidence that this same decision would not have been extended to these petitioners. However, when confronted with the three student athlete petitioners, they were faced with disrespect, disobedience and combativeness, even before the player interviews could begin. The coaches had to react without the benefit of years of judicial training and months of reading, analysis and discussion.

There is dispute among the three Panel members as to, the constitutionality of the petition and subsequent discipline of the student players. The constitutionality of their actions surely cannot be said to have been clearly established under the facts facing these coaches in October 2005.

Based on the cases cited hereinabove, respondents submit that Judge Gilman was correct that there was no basis for these respondents to believe that their actions in dismissing these student athletes from the football team would subject them to liability, especially where the cases had stated that petitions stating harsh criticism or using fowl

language against the coach of a high school athletic team were not constitutionally protected in the first place. Further, based on the facts of this case, where the actions of the student athletes were disobedient and combative toward the coaching staff, separate and apart from the issue of the petition, respondents had no choice but to eject them from the team. Even the team members who watched the interaction between the student petitioners and the coaches expected adverse consequences, separate and apart from the existence of the petition.

CONCLUSION

Respondents submit that the unanimous conclusion of the panel is correct. The speech in issue is not constitutionally protected and, thus, not actionable against these respondents. Further, at the time the respondents were faced with the situation involving the Jefferson County High School football program, it was not clearly established that their actions would potentially subject them to constitutional scrutiny or liability so the extension of qualified immunity is appropriate. Respondents, however, further submit that the majority opinion is not in conflict with precedent of this Supreme Court. The reference to *Connick* was as an analogous and illustrative scenario. The decision as to the instant case was already determined without any "public concern" gloss or requirement. Noting the petitioners' activities in the locker room, the panel majority recognized the reality that

substantial interference with the school football program was going to occur based on the petitioners' attempts to incite team mutiny.

No violation of petitioners' First Amendment rights occurred. The Panel decision was correct. Contrary to petitioners' assertion, there is no genuine conflict that must be resolved pursuant to Supreme Court Rule 10 and there is no issue so critically significant as to require this Court to extend certiorari review to this matter. The petitioners' petition for writ of certiorari should be denied.

Respectfully submitted,

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106

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In The
Supreme Court of the United States

DERRICK ("RABBIT") LOWERY, a minor, et al.,
Petitioners,

v.

MARTY EUVERARD, et al.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITIONERS' REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF CITED AUTHORITIES iii

INTRODUCTION 1

REPLY TO RESPONDENTS' STATEMENT OF ADDITIONAL FACTS 1

REPLY TO RESPONDENTS' ARGUMENTS 3

I. THE PETITION SATISFIES SUPREME COURT RULE 10(A) BECAUSE THERE IS A SPLIT AMONG THE CIRCUITS ON THREE DISTINCT AND IMPORTANT QUESTIONS OF FEDERAL LAW 3

A. There is a genuine conflict on the question whether a student may be punished where there is no evidence of substantial and material interference with the operation of the school. 3

B. The Ninth, Second, and Tenth Circuits have expressly rejected a requirement that student speech must involve a matter of public concern. 5

C. There is a split between courts of appeals on the question whether punishment of student speech by the expulsion from an extracurricular activity constitutes adverse action 5

II. THE PETITION SATISFIES SUPREME COURT RULE 10(C) IN THAT THE SIXTH CIRCUIT HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW THAT SHOULD BE SETTLED BY THIS COURT ... 6

A. Respondents do not address the standard in a retaliation case under 42 U.S.C. § 1983 for demonstrating an adverse action. 7

B. Respondents do not deny that the particular viewpoint of the student-athletes was being targeted. 8

C. Respondents are incorrect in their assertion that the panel of the Sixth Circuit uses *Connick v. Myers*, 461 U.S. 138, 146 (1983) only as an analogy. 10

CONCLUSION 13

TABLE OF CITED AUTHORITIES

CASES

Bennett v. Hendrix,
423 F.3d 1247 (11th Cir. 2005) 7

Cain v. Tigard-Tualatin Sch. Dist. 23J,
262 F. Supp. 2d 1120 (D. Or. 2003) 12

Carroll v. Pfeffer, 262 F.3d 847 (8th Cir. 2001) ... 6

City of San Diego v. John Roe,
543 U.S. 77 (2004) 12

Connick v. Myers, 461 U.S. 138 (1983) 10, 12

Constantine v. Rectors & Visitors,
411 F.3d 474 (4th Cir. 2005) 6

Crawford-El v. Britton, 523 U.S. 574 (1998) ... 7, 8

Doninger v. Niehoff, 527 F.3d 41 (2d Cir. 2008) .. 7

Garcetti v. Ceballos, 547 U.S. 410 (2006) 11

Garcia v. S.U.N.Y. Health Serv. Center,
280 F.3d 98 (2d Cir. 2001) 5

Good News Club v. Milford Central School,
533 U.S. 98 (2001) 8, 9

Guiles v. Marineau, 461 F.3d 320 (2d Cir. 2006) .. 4

Henley v. Tullahoma City Sch. Sys.,
84 Fed. Appx. 539 (6th Cir. 2003) 6, 8

Holloman v. Harland,
370 F.3d 1252 (11th Cir. 2004) 6, 11

Keyishian v. Board of Regents,
385 U.S. 589 (1967) 11

Morse v. Frederick, 127 S. Ct. 2618 (2007) 9,10

Perry v. Sindermann, 408 U.S. 593 (1972) 8

Pinard v. Clatskanie,
467 F.3d 755 (9th Cir. 2006) 4, 5, 6

Rankin v. McPherson, 483 U.S. 378 (1987) 9

Rosenberger v. Rector & Visitors,
515 U.S. 819 (1995) 9

Rutan v. Republican Party,
497 U.S. 62 (1990) 2, 7, 8

Saxe v. State College,
240 F.3d 200 (3d Cir. 2001) 4

Scott v. Harris, 127 S. Ct. 1769 (2007) 3

Seamons v. Snow,
84 F.3d 1226 (10th Cir. 1996) 4, 6

Seamons v. Snow,
206 F.3d 1021 (10th Cir. 2000) 5

Siggers-Dell v. Barlow,
412 F.3d 693 (6th Cir. 2005) 8

Texas v. Johnson, 491 U.S. 397 (1989) 9

Thaddeus-X v. Blatter,
175 F.3d 378 (6th Cir. 1999) 6, 7, 8

Tinker v. Des Moines Independent School District,
393 U.S. 503 (1969) ..... *passim*

Wildman v. Marshalltown,
249 F.3d 768 (8th Cir. 2001) 4, 6

STATUTES

42 U.S.C. § 1983 5

RULES

Sup. Ct. R. 10(a) 3

Sup. Ct. R. 10(c) 6

INTRODUCTION

In *Tinker v. Des Moines Independent School District*, 393 U.S. 503, 509 (1969), this Court expressly held that the First Amendment rights of public school students extend to "the playing field." If the Petition for Writ of Certiorari is not granted, constitutional protection will extend only to cases where a student's speech involves a matter of public concern and only where school officials go so far as to suspend or expel the student for such speech.

REPLY TO RESPONDENTS' STATEMENT OF ADDITIONAL FACTS

Respondents did not dispute that the petition was circulated for a three-day period without any disruption.[1] Respondents did not dispute that Euverard developed a plan to identify those responsible. Respondents did not dispute that the principal told the father of Jacob Giles that "there's got to be consequences for whoever is involved in this" or that Euverard and the assistant coaches agreed that dismissing all players who signed was "an acceptable price to pay" for team unity. Finally, Respondents did not deny that, after it became evident that a large number had signed the petition, Euverard did not impose any punishment on those players who lied to him.

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[1] Although, Respondents represent that "Petitioners' case focuses entirely upon the written document identified as a petition..." (Opp., p. 1), the speech also includes statements that Euverard should be replaced with another coach.

Instead, Respondents engage in an *ad hominem* attack on the boys, painting them as disrespectful ruffians, accusing them of being insubordinate, and using inflammatory language such as "defiance," "impudence," and "insolence." The facts do not support this unjustified, personal barrage, and it is apparently just a tactic to minimize the First Amendment issues at stake. What Respondents now call "rank insubordination" was the statement by one – Joseph Dooley – that the boys wanted to talk to Euverard as a group instead of meeting alone with him. Euverard never told the players that he regarded this conduct as insubordinate, never said there would be punishment if they refused to meet alone, and subsequently told an assistant coach, "those three *decided to* leave." Euverard's description of the situation immediately after it occurred is inconsistent with his later justification. Further, there is no evidence that Euverard had ever disciplined a player for similar conduct in the past.

The District Court correctly found that, although the speech was protected, the basis for the dismissal was a question of fact, to be determined at trial. *Rutan v. Republican Party*, 497 U.S. 62, 67-68 (1990). Yet, Respondents ask this Court to determine that "the players were dismissed from the football team not because of the petition, but because of their subsequent insubordination." (Opp., p. 18). With respect to Dillon Spurlock, Respondents urge this Court to accept Euverard's version of events – that he voluntarily quit. (Opp., p. 4, n.4). This is an entirely improper request. What this Court must determine is whether, "[t]aken in the light most favorable to the party asserting the injury," the facts establish conduct

that is irreconcilable with the Constitution. *Scott v. Harris*, 127 S. Ct. 1769, 1774 (2007).

REPLY TO RESPONDENTS' ARGUMENTS

I. THE PETITION SATISFIES SUPREME COURT RULE 10(A) BECAUSE THERE IS A SPLIT AMONG THE CIRCUITS ON THREE DISTINCT AND IMPORTANT QUESTIONS OF FEDERAL LAW.

In construing Rule 10(a), Respondents assert, without citation to a case from any court, that "[t]here must be an intolerable conflict on the same matter of law or fact...." (Opp., p. 13). Based upon this broad premise, Respondents claim that Petitioners have not pointed to a case from another circuit where the facts and issues of law are the same but the decisions are contradictory. *Id.* In so doing, Respondents ignore the clear split of the circuits on three important issues of federal law.

A. There is a genuine conflict on the question whether a student may be punished where there is no evidence of substantial and material interference with the operation of the school.

In *Tinker*, this Court expressly held that mere "undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression. . . ." 393 U.S. 508-09. Here, the undisputed facts are that the circulation and signing of the petition did not cause any disruption. Yet, the panel dispensed with the need for actual evidence,

relying upon the opinions of sportswriters and professional athletes. In so doing, the Sixth Circuit followed the decision in *Wildman v. Marshalltown*, 249 F.3d 768 (8th Cir. 2001). The *Wildman* court acknowledged that "there was no specific evidence of a material disruption of a school activity. . .," but found that punishment for the "insubordinate speech" itself was appropriate. *Id.* at 771.

The Third, Second, Ninth, and Tenth circuits have held that actual evidence of disruption is required. In *Saxe v. State College*, 240 F.3d 200, 211 (3d Cir. 2001), the Third Circuit held that *Tinker* requires "a specific and significant fear of disruption, not just some remote apprehension of disturbance." The court found that the school's anti-harassment policy violated *Tinker* because it punished "not only speech that actually causes disruption, but also speech that merely intends to do so. . . ") (Alito, J). Similarly, in *Guiles v. Marineau*, 461 F.3d 320, 331 (2d Cir. 2006), the Second Circuit required some proof of disruption in concluding that censorship of images on a student's T-shirt violated *Tinker*.

The Tenth and Ninth Circuits have reached the same conclusion in cases that are extremely similar on the facts. *Seamons v. Snow*, 84 F.3d 1226 (10th Cir. 1996) was discussed in the Petition, and that analysis will not be repeated. It is significant, however, that Respondents ignore the material facts in *Seamons*, where the Tenth Circuit rejected the school system's generalized "fear of a disturbance stemming from the disapproval" associated with the player's unpopular viewpoint. *Id.* at 1238. Similarly, in *Pinard v. Clatskanie*, 467 F.3d 755 (9th Cir. 2006), the Ninth

Circuit concluded that the First Amendment protected a petition circulated by a group of athletes as well as verbal complaints about the coach. *Id.* at 768.

B. The Ninth, Second, and Tenth Circuits have expressly rejected a requirement that student speech must involve a matter of public concern.

Because the panel expressly stated that whistle-blower cases or speech involving politics or religion would constitute protected speech, the opinion establishes a public concern requirement that "significantly alters First Amendment jurisprudence. . . ." (App. 39a) (Gilman, J.). In contrast, the three other circuits which have expressly considered this question are unanimous in rejecting this requirement. *Garcia v. S.U.N.Y. Health Serv. Center*, 280 F.3d 98, 106 (2d Cir. 2001); *Pinard*, 467 F.3d at 766; *Seamons v. Snow*, 206 F.3d 1021, 1030, n.4 (10th Cir. 2000). Therefore, there now is a clear split of authority in the circuits on whether student speech lacks protection unless it involves a matter of public concern.

C. There is a split between courts of appeals on the question whether punishment of student speech by the expulsion from an extracurricular activity constitutes adverse action.

Finally, there is a clear split of authority on the question whether expulsion from an extracurricular activity may be an adverse action under 42 U.S.C. § 1983. The Sixth Circuit and the Eighth Circuit have

applied the "ordinary firmness" standard to free speech cases involving adults (*Thaddeus-X v. Blatter*, 175 F.3d 378, 394 (6th Cir. 1999); *Carroll v. Pfeffer*, 262 F.3d 847, 850 (8th Cir. 2001) *cert. denied*; however, these circuits have applied a more stringent standard to students. *Wildman*, 249 F.3d at 772; *Lowery* (App. 36a).

In contrast, multiple other courts have held that retaliation against students for engaging in protected speech should be measured by the "ordinary firmness" standard. *See, e.g., Seamons*, 84 F.3d at 1237; *Pinard*, 467 F.3d at 766; *Constantine v. Rectors & Visitors*, 411 F.3d 474, 500-01 (4th Cir. 2005); *Holloman v. Harland*, 370 F.3d 1252, 1264 (11th Cir. 2004). In fact, in three of these cases, appellate courts have held that permanent dismissal from an athletic team would chill an ordinary student from engaging in the speech. *Seamons*, 84 F.3d at 1237; *Pinard*, 467 F.3d at 766; *Henley v. Tullahoma City Sch. Sys.*, 84 Fed. Appx. 539, 540 (6th Cir. 2003).

II. THE PETITION SATISFIES SUPREME COURT RULE 10(C) IN THAT THE SIXTH CIRCUIT HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW THAT SHOULD BE SETTLED BY THIS COURT.

The most telling omission in Respondents' brief is the failure to address the guidelines contained in Rule 10(c). Here, review of the Sixth Circuit opinion is warranted because it presents a far-reaching question of first impression: whether student speech rights fall outside the protections of *Tinker*, regardless of the specific punishment inflicted, as long as the students'

"ability to attend class has not been threatened." (App. 36a). Whether the student is an actor, a singer, a swimmer, or a member of the band, extracurricular activities are extremely important to students, and their loss would be devastating. It is essential for students, school officials, and district courts to know whether punishment involving these activities removes a student's speech from constitutional protection.[2]

A. Respondents do not address the standard in a retaliation case under 42 U.S.C. § 1983 for demonstrating an adverse action.

Respondents claim that "[t]he dismissal of the student athletes from the high school football team was not an adverse action so as to violate 42 U.S.C. § 1983..." (Opp., p. 19), but there is no analysis to undergird this conclusion. Respondents do not address the applicability of the 'unconstitutional conditions' doctrine and do not deny that the uniform standard for evaluating an adverse action is whether the punishment would "deter a person of ordinary firmness from continuing to engage in that conduct." *Bennett v. Hendrix*, 423 F.3d 1247, 1250-51 (11th Cir. 2005). Respondents do not dispute that plaintiff's evidentiary burden is merely to establish that the acts of retaliation amount to more than a *de minimus* injury. *Thaddeus-X*, 175 F.3d at 398. Respondents do not try to distinguish *Rutan, Crawford-El,* or other

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[2] The Second Circuit has already cited *Lowery* as authority for a student's being disqualified from running for senior class secretary based upon her speech. *Doninger v. Niehoff*, 527 F.3d 41, 52 (2d Cir. 2008).

cases which illustrate how a comparatively minor punishment may constitute the adverse action. *Rutan*, 497 U.S. at 76, n.8 (1990); *Crawford-El v. Britton*, 523 U.S. 574 (1998); *Siggers-Dell v. Barlow*, 412 F.3d 693, 701 (6th Cir. 2005); *Thaddeus-X*, 175 F.3d at 399; *Henley*, 84 Fed. Appx. at 540.

Instead, Respondents cite general principles from *Bethel* and *Hazelwood* that have nothing to do with the level of punishment necessary to have a chilling effect on student speech. Respondents also raise a red herring – that a student has no liberty interest in playing interscholastic athletics. (Opp., p. 19). Petitioners have never asserted a due process violation, and the District Court granted partial summary judgment based upon *Tinker*. Further, in *Perry v. Sindermann*, this Court made it abundantly clear that, where a government official retaliates against a citizen for exercising a constitutional right, the adverse action need only be the denial of some benefit -- not a life, liberty, or property interest. 408 U.S. 593, 597 (1972). These four students may not have had a constitutional right to play high school football, but they had a right not to be kicked off the team for exercising their First Amendment right to criticize an abusive adult.

B. Respondents do not deny that the particular viewpoint of the student-athletes was being targeted.

This Court has indicated that "the invocation of teamwork [and] loyalty" reflect a particular viewpoint. *Good News Club v. Milford Central School*, 533 U.S. 98, 111 (2001). The panel clearly agrees with this

viewpoint; without any evidence of disruption, the court concluded that the viewpoint expressed in the petition "undermined his ability to lead the team and threatened team unity." (App. 24a). Yet, in multiple cases, this Court has stressed that censorship based upon the viewpoint of the speaker is the most egregious type of First Amendment violation. *Morse v. Frederick,* 127 S. Ct. 2618, 2644 (2007) (Stevens, J., dissenting); *Good News Club*, 533 U.S. at 106-110; *Rosenberger v. Rector & Visitors*, 515 U.S. 819, 828 (1995); *Texas v. Johnson*, 491 U.S. 397, 414 (1989). Further, it is beyond cavil that the First Amendment protects the right to engage in speech that criticizes public officials. *Rankin v. McPherson*, 483 U.S. 378, 384 (1987).

Respondents do not deny these basic principles nor do they deny that the viewpoint of the student-athletes was being targeted by the administration. There are numerous facts which indicate that Respondents took action to squelch the viewpoint that Euverard needed to be replaced as coach:

* Euverard's conducting one-on-one interrogations and asking questions only about the petition to "smoke out' the culprits (App. 44a) (Gilman, J., concurring),

* High school principal calling Spurlock "stupid" for signing the petition,

* Three students who honestly admitted to signing the petition being separated from their teammates and directed to have their parents come to practice, and

* Principal's statement to Mr. Giles the night *before* any alleged insubordination that there had to be "consequences" for those who signed the petition.

The most compelling evidence that the viewpoint of the student-athletes was being targeted is found in Respondents' own brief: "Allow all the team members who did sign the petition *but recanted* and said they would play for the head coach to remain on the team." Opp., p. 28 [Emphasis added]. That is, those players who changed viewpoints had the sword of Damocles removed and were permitted to stay on the team. In so doing, Euverard and the school administration were censoring student speech based upon the "specific motivating ideology or the opinion or perspective of the speaker," a blatant and egregious violation of the First Amendment. *Morse*, 127 S. Ct. at 2644.

C. Respondents are incorrect in their assertion that the panel of the Sixth Circuit uses *Connick v. Myers*, 461 U.S. 138, 146 (1983) only as an analogy.

This Court has established separate tests of evaluating the free speech rights of minors attending public school and adults working for government employers. (App. 39a). *Morse*, 127 S. Ct. at 2625; *Connick v. Myers*, 461 U.S. 138, 146 (1983). Respondents do not dispute this distinction but argue that the lengthy discussion of the public concern test is merely argument by analogy. Opp. at 14-15. First, the analogy is inapposite. Public school students are minors, not adults, and there is a "gross disparity in power between a teacher and a student . . ."

Holloman v. Harland, 370 F.3d 1252, 1269 (11th Cir. 2004). Students attend public school by legal compulsion whereas public employees have voluntarily chosen to work for a governmental rather than private employer. *Garcetti v. Ceballos*, 547 U.S. 410, 418 (2006). Where, as here, a student is zoned for a particular high school, he or she cannot simply quit and go to another high school.

An employer's basis for limiting an adult employee's speech rights at work is that, "without it, there would be little chance for the efficient provision of public services." *Id.* at 418. In contrast, concern with efficiency has never informed the free speech rights of students. Undoubtedly, schools could operate much more efficiently if student's speech rights were curtailed. Given the importance of students learning the value of free speech, this Court has established a high standard for restricting student speech. *Tinker*, 393 U.S. at 513. Granting free speech to students is consistent with the normative value that a democratic society places on the rights of its citizens to express their opinions. The public school is the training ground for such rights. *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967) ("Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, [rather] than through any kind of authoritative selection").

Moreover, contrary to Respondents' conclusion, the panel went further than merely applying an analogy. Evidence is found in the panel's acknowledgement that it "must consider the content and context of the speech." (App. 10a). Just so, this Court has said that

to determine the boundaries of the public concern test, *Connick* "directs courts to examine the 'content, form, and context of a given statement, ..." *City of San Diego v. John Roe*, 543 U.S. 77, 83 (2004).

Evidence is also found in the acknowledgement that Euverard "could not dismiss a player simply because the player had religious or political views that were unpopular with his teammates" or in a "whistleblower situation, where players were disciplined for reporting improprieties." (App. 37a).[3] That is, the panel held that student speech in these areas – areas that have been held to be matters of public concern" – would be protected, but speech outside these areas could be censored. Thus, a player could advocate an extreme religious or political position, but he could not circulate a petition criticizing a coach because it "is reasonable to forecast that disruption will occur when a subordinate challenges the authority of his or her superior." (App. 33a – 34a, n.5). Further, since whistle-blowing is subject to protection, the panel apparently would have found the speech to be protected if only the phrase "because he hit my teammate" had been added to the petition.[4]

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[3] Respondents do not respond to the argument that this is a whistleblower situation. *Cain v. Tigard-Tualatin Sch. Dist. 23J*, 262 F. Supp. 2d 1120 (D. Or. 2003).

[4] The petition would then have read: "I hate Coach Euvard and I don't want to play for him because he hit my teammate."

CONCLUSION

The Sixth Circuit's decision that a school official may expel a student from an extracurricular activity based upon his or her viewpoint raises a novel and important question of federal law. Misused by a teacher, coach, or administrator, this weapon could undoubtedly chill a student from reporting abuse or other misconduct. For this reason, the Petition should be granted.

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In The

Supreme Court of the United States

DERRICK ("RABBIT") LOWERY, a Minor, et al.,

Petitioners,

v.

MARTY EUVERARD, DALE SCHNEITMAN, AND CRAIG KISABETH,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF AMICUS CURIAE LIBERTY LEGAL INSTITUTE IN SUPPORT OF PETITIONERS

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RE-DRAFTED QUESTIONS PRESENTED

May a government school official punish a student for peacefully petitioning for administrative change when the petition does not contain words that may be prohibited under *Bethel Sch. Dist. No. 403 v. Fraser,* 478 U.S. 675 (1986), or *Morse v. Frederick,* 127 S. Ct. 2618 (2007), the petition could not be interpreted as school-sponsored under *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988), and the school did not satisfy their burden that a "material and substantial" disruption to the operation of the school would result under *Tinker v. Des Moines*, 393 U.S. 503 (1969)?

In other words, is *Tinker* the mandated standard for student speech cases when *Bethel*, *Hazelwood*, and *Morse* do not control?

TABLE OF CONTENTS

Page

Re-drafted Questions Presented i

Interest of Amicus Curiae 1

Argument 2

I. Absent guidance on the actual application of the *Tinker* "material and substantial" disruption standard, some lower courts have either refused to apply *Tinker* or mistakenly limited *Tinker* in ways contrary to the Court's precedent 2

A. Lower federal courts have incorrectly stated that *Tinker* only applies to viewpoint-based policies and that the less-rigorous intermediate scrutiny test in *United States v. O'Brien*, 391 U.S. 367 (1968), controls when the regulation at issue is content-based, leaving student speech with substantially less protection 5

i. Applying *O'Brien* to student speech has allowed schools to suppress constitutionally protected student speech, including core religious speech 8

B. Other federal courts have also refused to apply *Tinker* and incorrectly analyzed student speech under forum analysis or by evaluating if the speech would have adverse effects on other students 9

TABLE OF CONTENTS – Continued

Page

II. Whether *Tinker* remains good law and how to properly apply its standard are important issues the Court must resolve 12

Conclusion 15

TABLE OF AUTHORITIES

Page

CASES

Barnes v. Glen Theatre, 501 U.S. 560 (1991).....5

Board of Educ. of Westside Cmty. Sch. v. Mergens, 496 U.S. 226 (1990).....14

Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675 (1986).....3, 10, 11, 13

Canady v. Bossier Parish Sch. Bd., 240 F.3d 437 (5th Cir. 2001).....5, 6

City of Erie v. Pap's A.M., 529 U.S. 277 (2000).....5

City of Los Angeles v. Alameda Books, Inc., 535 U.S. 425 (2002).....5

Connick v. Myers, 461 U.S. 138 (1983).....4, 12, 15

Fleming v. Jefferson Cty. Sch. Dist., 298 F.3d 918 (10th Cir. 2002).....4

Good News Club v. Milford Cent. Sch. Dist., 533 U.S. 98 (2001).....2, 11, 14

Guiles v. Marineau, 461 F.3d 320 (2nd Cir. 2006).....4

Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988).....3

Jacobs v. Barber, 526 F.3d 419 (9th Cir. 2008).....7

Krestan v. Deer Valley Unified Sch. Dist. No. 97, No. CV-08-194-PHX-DGC, slip op. (D. Ariz. May 9, 2008).....10

TABLE OF AUTHORITIES – Continued

Page

Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384 (1993) 2, 15

Littlefield v. Forney Indep. Sch. Dist., 268 F.3d 275 (5th Cir. 2001) 6

Lowery v. Euverard, 497 F.3d 584 (6th Cir. 2007) 13

Morgan v. Plano Indep. Sch. Dist., No. 4:04cv447, slip op. at 2 (E.D. Tex. Feb. 20, 2007) 9

Morse v. Frederick, 127 S. Ct. 2618 (2007) 3, 4, 6, 7, 10

Monell v. Dept. of Soc. Serv. of New York, 436 U.S. 658 (1978) 11

Muller v. Jefferson Lighthouse Sch., 98 F.3d 1530 (7th Cir. 1996) 9

Newsom v. Abemarle Cty. Sch. Bd., 354 F.3d 249 (4th Cir. 2003) 4

Nuxoll v. Indian Prairie Sch. Dist. #204, 523 F.3d 668 (7th Cir. 2008) 10

Pickering v. Bd. of Educ., 391 U.S. 563 (1968) 12, 13

Pinard v. Clatskanie Sch. Dist., 467 F.3d 755 (9th Cir. 2006) 4

Pounds v. Katy I.S.D., 517 F. Supp. 2d 901 (S.D. Tex. 2007) 6

Rosenberger, v. Rector & Visitors of the Univ. of Va., 515 U.S. 819 (1995) 2

TABLE OF AUTHORITIES – Continued

Page

Saxe v. State Coll. Area Sch. Dist., 240 F.3d 200 (3rd Cir. 2001) 4, 8

Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969) ..... *passim*

United States v. O'Brien, 391 U.S. 367 (1968) 5, 6, 8

Widmar v. Vincent, 454 U.S. 263 (1981) 15

INTEREST OF AMICUS CURIAE[1]

The Liberty Legal Institute is a non-profit law firm dedicated to the preservation of religious freedom and other First Amendment rights. In its commitment to the protection of religious liberty and speech, the Institute has been involved in significant First Amendment litigation nationwide, including several student speech cases in public schools. The Institution is gravely concerned that student speech will be threatened if the Court does not affirm that *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969), is the controlling precedent for student speech, clarify that the school bears the burden of proof on the substantial disruption affirmative defense, and remand for consideration in light of the opinion.

Amicus believes that *Tinker* provides the best framework for analyzing freedom of speech in public schools. *Tinker* affords substantial protection for student speech and expression, while still allowing schools to operate effectively. Lower courts, unfortunately, have set aside the *Tinker* framework and substituted a lower standard unfit for evaluating student speech. Given the importance of free speech

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[1] The parties of record received proper notice of and consented to the filing of this brief in support of Petitioner. Amicus states that no portion of this brief was authored by counsel for a party and that no person or entity other than amicus made a monetary contribution to the preparation or submission of this brief.

and expression, the Court should be very cautious when granting government broad powers to prohibit it, even in the context of public schools.

ARGUMENT

I. Absent guidance on the actual application of the *Tinker* "material and substantial" disruption standard, some lower courts have either refused to apply *Tinker* or mistakenly limited *Tinker* in ways contrary to the Court's precedent.

Some federal courts have tried to cabin away *Tinker* by declaring that it only applies to viewpoint discriminatory policies. This is contrary to this Court's precedent, as viewpoint discrimination jurisprudence is an independent body of law; when a policy is challenged that constitutes viewpoint discrimination, *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819 (1995), *Good News Club v. Milford Cent. Sch. Dist.*, 533 U.S. 98 (2001), and *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993) provide the appropriate standard. But even more compelling is the fact that *Tinker* itself declared that it is not limited to viewpoint-based regulations. In *Tinker,* students decided to wear black armbands to express their opposition to the Vietnam War. In response to the planned protest, school authorities prohibited the wearing of ***all*** armbands, and provided that any students wearing armbands would be suspended until they returned without them. The

Court, in striking the policy down, specifically stated that the material and substantial disruption standard "obvious[ly]" applies to *both* content-based and viewpoint-based policies.

> If a regulation were adopted by school officials forbidding discussion of the Vietnam conflict [content-based regulation], *or* the expression by any student of opposition to it [viewpoint-based regulation] anywhere on school property except as part of a prescribed classroom exercise, it would be obvious that the regulation would violate the constitutional rights of students, at least if it could not be justified by a showing that the students' activities would *materially and substantially disrupt* the work and discipline of the school.

Tinker, 393 U.S. at 513 (emphasis and bracketed words added).

The Court has continually affirmed *Tinker*'s holding, but delineated three exceptions to the case's framework: (1) speech that could be "reasonably viewed as promoting illegal drugs" *Morse*, 127 S. Ct. at 2625; (2) "vulgar and lewd speech" *Bethel*, 478 U.S. at 685; and (3) "school-sponsored" speech, *Hazelwood*, 484 U.S. at 271. Although the Court's precedent mandates that *Tinker's* material and substantial disruption standard governs as long as the speech does not fall within one of the above exceptions, several federal

courts have ignored or diminished *Tinker*, threatening student speech.[2]

This is an important case because it affords the Court the opportunity to re-affirm that *Tinker* is the controlling precedent for student speech cases absent vulgar, lewd or profane language, absent any school publication scenario, and absent language that arguably promoted the use of illegal narcotics. This is an important case about the rights of students to petition the government for change in governmental administration. The application of *Connick v. Myers*, 461 U.S. 138 (1983), to student speech is but the most recent of a line of federal cases seeking to abandon *Tinker* for standards more deferential to the State. Other than *Bethel*, *Hazelwood*, and *Morse*, there is no opinion from this Court that holds "the special characteristics of the public schools necessarily justify any other speech restrictions," such as applying *Connick* or applying any other more deferential standard than *Tinker*, such as the *O'Brien* standard. *See Morse*, 127 S. Ct. at 2637 (Alito, J., concurring).

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[2] While this brief discusses the cases where federal courts either intentionally did not apply Tinker out of some philosophical disagreement or were simply confused, there are federal courts that have applied the proper analysis. *See, e.g., Guiles v. Marineau*, 461 F.3d 320, 325 (2nd Cir. 2006); *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 214 (3rd Cir. 2001) (Alito, J.); *Newsom v. Abemarle Cty. Sch. Bd.*, 354 F.3d 249, 255-57 (4th Cir. 2003); *Pinard v. Clatskanie Sch. Dist.*, 467 F.3d 755, 765 (9th Cir. 2006); *Fleming v. Jefferson Cty. Sch. Dist.*, 298 F.3d 918, 923 (10th Cir. 2002).

A. Lower federal courts have incorrectly stated that *Tinker* only applies to viewpoint-based policies and that the less-rigorous intermediate scrutiny test in *United States v. O'Brien*, 391 U.S. 367 (1968), controls when the regulation at issue is content-based, leaving student speech with substantially less protection.

Using the *O'Brien* intermediate scrutiny to evaluate student speech is completely without Supreme Court precedent. Although the Court decided *O'Brien* in 1968, prior to every student speech case at the Supreme Court, the Court has never once mentioned *O'Brien* as relevant to student speech analysis and continually affirmed *Tinker*. The *O'Brien* standard is most famous for its application to zoning regulations aimed at limiting the secondary effects of adult book stores, nude dancing establishments, and other adult entertainment venues, *see City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425 (2002); *Barnes v. Glen Theatre*, 501 U.S. 560 (1991); *City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000), and is misapplied when student speech is at issue.

In 2001, the Fifth Circuit refused to apply the *Tinker* framework in two cases where a school's content-based regulation was at issue, and instead applied the less demanding time, place, and manner analysis from *O'Brien*. In *Canady v. Bossier Parish Sch. Bd.*, 240 F.3d 437 (5th Cir. 2001), parents of students unsuccessfully challenged the dress code

policy because it did not provide exceptions for religious attire. The Fifth Circuit found that the "School Board's uniform policy is unrelated to any viewpoint" and incorrectly stated that *Tinker* does not apply since it "does not account for regulations that are completely viewpoint-neutral." *Id.* at 443. The court held that "a level of scrutiny should apply . . . [that is] less stringent than the school official's burden in *Tinker*" and that "[b]oth the traditional time, place and manner analysis and the *O'Brien* test for expressive conduct satisfy this requirement." *Id.*

During the same year, the Fifth Circuit in *Littlefield v. Forney Indep. Sch. Dist.*, 268 F.3d 275 (5th Cir. 2001), upheld a dress code policy that was challenged under religious grounds, *inter alia*. The court rubberstamped the *Canady* decision and applied the *O'Brien* analysis without even a discussion of whether *Tinker* should apply.

In *Pounds v. Katy I.S.D.*, 517 F. Supp. 2d 901 (S.D. Tex. 2007), post-*Morse*, a federal district court upheld a school policy governing what type of literature students in school could distribute over a challenge that it infringed upon student religious speech. The court applied *Canady* in holding that *O'Brien*, and not *Tinker*, applied when reviewing student speech regulations that are not viewpoint-based. The court ignored the Plaintiffs' argument that Justice Alito's concurring opinion from *Morse* controlled, and instead applied the *O'Brien* standard, even though the case involved students handing religious literature to other students. The court found that distribution of

religious literature was not pure speech deserving protection under *Tinker* – and this was after *Morse*.

In addition to the Fifth Circuit, the Ninth Circuit, in another post-*Morse* decision, refused to apply *Tinker* in a school speech case. *Jacobs v. Barber*, 526 F.3d 419 (9th Cir. 2008), upheld a school dress code that allowed only plain clothes or school logos against challenges that it violated students' right to free speech, including religious speech. One student was suspended four times after wearing a T-shirt containing a message expressing the student's religious beliefs as a member of the Church of Jesus Christ of Latter-day Saints. The court applied the intermediate scrutiny standard as defined by *O'Brien* and held that *Tinker* was not applicable. The opinion incorrectly stated that *Tinker* "extends only to viewpoint-based speech restrictions, and not necessarily to viewpoint-neutral speech restrictions" and that it "applies only to restrictions on pure speech." *Id.* at 430 (internal quotation marks omitted). Judge Thomas, in dissent, correctly argued that the court's opinion "represents a substantial rewriting and undermining of the First Amendment protections afforded by *Tinker*." *Id.* at 442. Under these Fifth Circuit and Ninth Circuit cases, bans on student speech, including core political and religious speech, are not evaluated under the material and substantial disruption standard; under these cases, a school could ban an entire discussion of the Vietnam War, as long as it did not ban only one side of the discussion or the other, and survive a

constitutional challenge in direct contravention of *Tinker*. *See Tinker*, 393 U.S. at 513.

The Court should grant the petition to affirm the approach taken by the Third Circuit in *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200 (2001) (Alito, J.). The court stated: "[n]or do we believe that the restriction of expressive speech on the basis of its content may be characterized as a mere 'time, place, and manner' regulation." *Id.* at 209. It struck down the school's policy because it was not limited to merely vulgar or lewd speech or to speech that was school-sponsored, and the policy's restrictions were not necessary to prevent substantial disruption or interference with school or rights of other students. *Id.* at 215 (the case was handed down before the Court delineated the exception for promoting illegal drug use in *Morse*). This approach correctly follows the Supreme Court's precedent and allows for substantial protection of student speech.

i. Applying *O'Brien* to student speech has allowed schools to suppress constitutionally protected student speech, including core religious speech.

Knowing that broad sweeping bans on speech had a better chance of survival under the intermediate scrutiny applied in *O'Brien*, schools within the Fifth Circuit began banning all student speech on specified topics. For example, schools in Texas

adopted the Texas Association of School Board's model policy FNAA (local) (*See* App. 1) banning students from even handing a pencil to a friend that bore the message "No. 2 pencil." Additionally, a school district in Texas used that policy to prohibit a girl from handing her friend a "Jesus is the Reason for the Season" pencil and banned a boy from handing his friends bookmarks bearing the "Legend of the Candy Cane." *Morgan v. Plano Indep. Sch. Dist.*, No. 4:04cv447, slip op. at 2 (E.D. Tex. Feb. 20, 2007). If the test in *Tinker* is not applied, clearly non-disruptive speech, such as handing a pencil bearing a religious message to a friend at school between classes, can be prohibited by schools in the Fifth and Ninth Circuits.

B. Other federal courts have also refused to apply *Tinker* and incorrectly analyzed student speech under forum analysis or by evaluating if the speech would have adverse effects on other students.

The Seventh Circuit circumvented *Tinker* in *Muller v. Jefferson Lighthouse Sch.*, 98 F.3d 1530 (7th Cir. 1996), when it considered a school ban on students distributing invitations to a religious gathering. The Seventh Circuit, using forum analysis and declaring the school a non-public forum, held that *Hazelwood* applies to all student speech regulations, regardless of whether the speech was school-sponsored. This is contrary to the correct approach

taken by the Third Circuit in *Saxe*, and contrary to the Supreme Court's jurisprudence on these issues.

In *Nuxoll v. Indian Prairie Sch. Dist. #204*, 523 F.3d 668 (7th Cir. 2008), the Seventh Circuit considered a case involving a high school student who was forbidden from wearing a shirt reading, "Be Happy, Not Gay" because it would offend another group. Although it overturned the regulation in an as-applied challenge, the court declined to apply *Tinker*, holding that it applied only to viewpoint discrimination, and not content discrimination. Instead, the court inferred from *Morse* and *Bethel* that schools can forbid a type of speech if there is "reason to believe that [it] will lead to a decline in students' test scores, an upsurge in truancy, or other symptoms . . . of substantial disruption." *Id.* at 674. The court also held that Alito's concurrence in *Morse* was not controlling. *Id.* at 673. Applying its rule, the court found that because derogatory speech can cause psychological harm and lower grades, the rule was Constitutional, but that the application to Nuxoll's shirt was invalid because it was not sufficiently negative to be substantially hurtful. *Id.* at 18, 21. An eloquent partial concurrence by Judge Rovner defended *Tinker* and the importance of school speech. *Id.* at 677. The opinion correctly stated that "[c]ontrary to the majority's characterization, *Tinker* is not a case about viewpoint discrimination and is not distinguishable from the instant case." *Id.*

In *Krestan v. Deer Valley Unified Sch. Dist. No. 97*, No. CV-08-194-PHX-DGC, slip op. (D. Ariz. May 9,

2008), the court held that a Christian prayer and Bible study club could be prevented from distributing pamphlets. It rejected a *Tinker* analysis and held that the prohibition on pamphlet distribution was a viewpoint-neutral and reasonable restriction on speech in a limited public forum under *Good News Club*. *Id.* at 16.

These cases highlight the importance of this petition and the need for the Court to clarify that *Tinker* is the required test for student speech that falls outside of the categories delineated in *Fraser*, *Hazelwood* and *Morse*. Without clarification on the underlying test, federal courts are either confused or no longer believe *Tinker* is the mandated approach. But without *Tinker*, schools will simply adopt broad sweeping bans on student speech and declare themselves free of any viewpoint discrimination. If a teacher or principal were to tell a student that they are not allowed to hand another student literature about God or Jesus or Mohammad at school, the school district will not face any liability. Under *Monell v. Dept. of Soc. Serv. of New York*, 436 U.S. 658 (1978), the school district will simply argue that no viewpoint discrimination is authorized by the policy. Instead, **ALL** speech is prohibited, which invariably includes core political and religious speech. An eighteen year old may be old enough to die in Baghdad for our freedom, but without *Tinker*, she may be prohibited by the State from wearing a button advocating for her candidate of choice as Commander in Chief. The Court should grant the petition to protect the

rights of students to engage in core political and religious speech.

II. Whether *Tinker* remains good law and how to properly apply its standard are important issues the Court must resolve.

In the present case, high school students[3] were exercising their basic constitutional rights to "free speech" and to "petition the Government for a redress of grievances." *See* U.S. CONST. amend. I. The court used *Connick v. Meyers*, 461 U.S. 138 (1983) and *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968), two employment law cases, to deprive the students of their right to petition the government for a change in an appointed office. This is a massive deviation from *Tinker* and *Morse* and must be corrected. As Judge Gilman points out in his concurrence, this approach "has never before taken in student-speech cases by

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[3] The Plaintiffs in this case were of substantially similar age to many of the founders when they began their public service and military careers. George Washington was seventeen when he was appointed to his first public office as the Surveyor of Culpeper County, Virginia. John Quincy Adams held his first diplomatic appointment at age fourteen when he accompanied Francis Dana as his secretary on a diplomatic mission to Russia during the Revolution. Aaron Burr became a Captain in the Continental Army at age nineteen. Jonathan Dayton, a delegate to the Constitutional Convention and Framer of the Constitution, joined the Continental Army at age sixteen and was promoted to Captain by age nineteen. James Wilkinson, a Revolutionary War hero, became a Captain in the Continental Army by age eighteen.

either the Supreme Court or any other federal court of appeals to consider the issue." *Lowery v. Euverard*, 497 F.3d 584, 601 (6th Cir. 2007). Additionally, the Sixth Circuit did not require the school to carry the burden of proof that the petition would cause a material and substantial disruption and therefore misapplied *Tinker*. As Judge Gilman again points out, the majority opinion "improperly places the burden on the students to prove that there would not have been a disruption. This is simply not the test articulated in *Tinker*." *Id.* at 603.

The Court should reaffirm that *Tinker* provides the appropriate standard for student speech, that the school bears the burden of proof on the substantial disruption affirmative defense, and remand for consideration in light of the opinion. Despite *Bethel*, *Hazelwood* and *Morse*, the Court has not revisited the underlying main test to reiterate to the unbelieving or confused lower courts that *Tinker* is alive and well, and its test means what it says. Student speech rights may not be coextensive with adults, but that only relates to permissible content-based restrictions outlined in *Bethel* and *Morse*, not the standard to be used to govern protected speech such as petitioning the government for a redress of grievances.

This new twist on student speech jurisprudence – the application of government-employee doctrine – that the Sixth Circuit implemented in the current case is yet another attempt to marginalize the protection Tinker provides to student speech. Students are not in the same position as government employees. Students are required to attend school under compulsory

attendance laws and thus parents must relinquish control of their children to the State for most of the day. This presents a significant challenge to religious families. The State daily inculcates students with mantras and messages that may, depending upon who is in power at the school and the values of the parents, undermine the teachings of the parents and the church the family attends. In addition, it is not uncommon upon a review of the evening news to see yet another teacher accused of inappropriate conduct involving students. Students should be free to dissent from the official state messages promoting cultural "norms" that run contrary to the family's or church's teachings, and students should have a voice to peacefully petition the government for change.[4]

Government schools do not have a history of welcoming the exercise of civil rights on campus, and they certainly have not been willingly accommodating religious speech. *See, e.g.*, *Board of Educ. of Westside Cmty. Sch. v. Mergens*, 496 U.S. 226 (1990); *Good News Club v. Milford Cent. Sch. Dist.*, 533 U.S. 98

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[4] The Sixth Circuit's reference to the movie *Hoosiers* is actually helpful to the students in this case. Later in the movie than the Sixth Circuit explored, there is a scene where the town establishment, including the school district, is gathered to run Coach Dale out of town. Jimmy Chitwood, a student and the star player, issues an ultimatum to the powers in the room – if Coach goes, I go. Jimmy was petitioning the government, caused quite a stir in the town, and directly contravened authority. Jimmy Chitwood's stand is a reminder to all that even the voice of a student can lead to positive change.

(2001); *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993); *Widmar v. Vincent*, 454 U.S. 263 (1981). Of course, there is a litany of cases since these landmark decisions in every circuit in the country enforcing these decisions. *Amicus* is on demonstrably solid ground when expressing doubt as to the wisdom of granting schools any more discretion to censor speech. If this new *Connick v. Meyers* balancing approach to student speech is not stopped, there is no doubt that the first casualty will be religious speech and any other speech that runs contrary to the questionable social agenda of most of our nation's public schools. The Court should grant the Petition and bring any speculation regarding *Tinker*'s continuing vitality to an end.

CONCLUSION

The Petition should be granted and the question of whether *Tinker* is the primary test for student speech cases should be answered to bring clarity and uniformity to the federal courts.

Respectfully submitted,

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APPENDIX

STUDENT EXPRESSION: DISTRIBUTION OF NONSCHOOL LITERATURE — FNAA (LOCAL)

For purposes of this policy, "distribution" means circulation of any written material, tapes, or other media over which the school does not exercise control and that is intended for dissemination to students.

The District's classrooms during the school day are provided for the limited purpose of delivering instruction to students in the courses and subjects in which they are enrolled. Hallways in school buildings are provided for the limited purpose of facilitating the movement of students between classes and allowing access to assigned lockers. Classrooms and hallways shall not be used for the distribution of any materials over which the school does not exercise control.

* * *